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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

WARWICK MALL TRUST, BLISS PROPERTIES, INC., AND IRVING SCHWARTZ,
PETITIONERS,

v.

THE STATE OF RHODE ISLAND, ET AL.,
RESPONDENTS.

On Petition for Writ of Certiorari to the Supreme Court of the State of Rhode Island

PETITION FOR WRIT OF CERTIORARI

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87 pp

QUESTION PRESENTED FOR REVIEW

Whether a party challenging the constitutionality of an act of the General Assembly of Rhode Island may, consistent with the constitutional protections afforded litigants, be required to prove its claim "beyond a reasonable doubt" upon a pretrial motion to dismiss the complaint for failure to state a claim.

LIST OF PARTIES TO PROCEEDINGS BELOW

Pursuant to Sup. Ct. R. 14(b), the Petitioners submit the following list of parties to the proceedings before the Supreme Court of Rhode Island.

The Petitioners, who were Plaintiffs-Appellants below, are:

Warwick Mall Trust;
Bliss Properties, Inc.;
Irving Schwartz.

There are no parent companies or nonwholly owned subsidiaries of Bliss Properties, Inc.

The Respondents, who were Defendants-Appellees below, are:

The State of Rhode Island;
The Honorable Lincoln S. Almond, in his capacities as Governor of the State of Rhode Island and Chairman of the Rhode Island Economic Development Corporation;
Providence Place Group.

There are no parent companies or nonwholly owned subsidiaries of the Rhode Island Economic Development Corporation.

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OPINIONS BELOW

The opinion of the Rhode Island Superior Court for Providence and Bristol Counties granting the Respondents' motion to dismiss the Petitioners' complaint was given orally from the bench, the relevant portions of which are set forth in the Appendix beginning at A-25. The order of the Superior Court is set forth in the Appendix at A-23 to A-24.

The July 19, 1996 order of the Supreme Court of the State of Rhode Island affirming the judgment of the Superior Court is unreported, and is set forth in the Appendix at A-1. The Supreme Court of the State of Rhode Island thereafter issued an opinion on October 11, 1996, which opinion is reported at 684 A.2d 252 (R.I. 1996) and is set forth in the Appendix beginning at A-4.

STATEMENT OF JURISDICTION

The order of the Supreme Court of Rhode Island sought to be reviewed here was entered on July 19, 1996. The Supreme Court of Rhode Island's opinion setting forth the reasons for the order was entered on October 11, 1996. This Court has jurisdiction to review that order under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, § 1 provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

R.I. Const. art. VI, § 16 provides as follows:

> Borrowing power of general assembly.— The general assembly shall have no powers, without the express consent of the people, to incur state debts to an amount exceeding fifty thousand dollars, except in time of war,

or in case of insurrection or invasion; nor shall it in any case, without such consent, pledge the faith of the state for the payment of the obligations of others. This section shall not be construed to refer to any money that may be deposited with the state by the government of the United States.

R.I. Const. art. XIII, § 4 provides as follows:

Powers of general assembly over cities and towns.—The general assembly shall have the power to act in relation to the property, affairs and government of any city or town by general laws which shall apply alike to all cities and towns, but which shall not affect the form of government of any city or town. The general assembly shall also have the power to act in relation to the property, affairs and government of a particular city or town provided that such legislative action shall become effective only upon approval by a majority of the qualified electors of the said city or town voting at a general or special election, except that in the case of acts involving the imposition of a tax or the expenditure of money by a town the same shall provide for the submission thereof to those electors in said town qualified to vote upon a proposition to impose a tax or for the expenditure or money.

R.I. Const. art. XIII, § 5 provides as follows:

> Nothing contained in [article XIII] shall be deemed to grant to any city or town the power to levy, assess and collect taxes or to borrow money, except as authorized by the general assembly.

The pertinent provisions of R.I. Pub. L. 95-400 are set forth in the Appendix beginning at A-49.

STATEMENT OF THE CASE

The Petitioners filed their complaint in the Superior Court of Rhode Island for Providence and Bristol Counties on December 29, 1995, alleging, inter alia, that R.I. Pub. L. 95-400 was invalid because it was not approved by the voters of the City of Providence as required by R.I. Const. art. XIII, § 4 (Complaint ¶ 13), because it operates as a pledge of the credit of the State of Rhode Island and lacked the approval of the voters of the State as required by R.I. Const. art. VI, § 16 (Complaint ¶ 15), and because it delegates legislative power in a manner which violates the Rhode Island and United States constitutional guarantees to due process. (Complaint ¶ 23.) The complaint sought a declaration that R.I. Pub. L. 95-400 was invalid and sought a preliminary injunction restraining the Respondents from taking any action pursuant to R.I. Pub. L. 95-400. The Respondents thereafter filed a motion to dismiss the complaint pursuant to R.I. R. Civ. P. 12(b)(6).

The Superior Court heard argument on this motion on February 28 and 29, 1996, and from the bench issued rulings dismissing each claim set forth in the complaint. The Superior Court thereafter entered an order dismissing the complaint. (A-23 to A-24.)

The Petitioners timely appealed the judgment entered in the Superior Court to the Supreme Court of Rhode Island. After briefs were filed and arguments heard, the Supreme Court of Rhode Island issued an order without opinion affirming the judgment of the Superior Court. (A-1 to A-2.) The Supreme Court of Rhode Island issued an opinion supporting its order on October 11, 1996. (A-3.)

The Petitioners filed the instant action in response to the Rhode Island General Assembly's passage of R.I. Pub. L. 95-400. R.I. Pub. L. 95-400 is legislation providing for public assistance for the development of the Providence Place Mall by private developers. The legislation granted the mall's private developers financial assistance, tax breaks, and other incentives for development of the mall. Such development was to occur within the City of Providence, Rhode Island, which is a Home Rule municipality under the Rhode Island Constitution and governed by a charter adopted in 1980. Petitioners Warwick Mall Trust and Bliss Properties, Inc., are the owner and operator, respectively, of a shopping mall located in Warwick, Rhode Island, and Petitioner Schwartz is a resident qualified voter of the City of Providence.

One provision of R.I. Pub. L. 95-400 authorizes the Rhode Island Economic Development Corporation ("EDC") and the City of Providence to enter into and

execute a tax treaty agreement with the private developer of the mall. Under the legislation, the tax treaty thereby authorized "shall provide" that the term of the treaty was to be for thirty years and that the developer was to make specified payments "in lieu of tax" for each of those thirty years. (A-49 to A-50.) As characterized by the Supreme Court of Rhode Island, the tax treaty contemplated by R.I. Pub. L. 95-400 "would effectively exempt the Project's real and personal property from municipal taxation for over thirty years. It would do so by earmarking what would otherwise constitute payments in lieu of taxes for debt-service payments to the Project's lenders." (A-9.)

Another provision of the legislation concerned the EDC's ability to bestow exemptions from state and local real and personal property taxes upon private parties. Rhode Island law had previously provided that EDC property and projects were exempt from all taxes levied by any municipality or political subdivision of the State. R.I. Gen. Laws § 42-64-20(a) (1993). R.I. Pub. L. 95-400 includes a provision allowing the EDC to allow this exemption to apply even if the EDC itself does not hold legal title to any real or personal property used in the development of a project. Such legal title may be held in the name of a lessee from the EDC, which lessee

> shall be exempt from taxation to the same extent as if legal title of such property were in the name of the [EDC], provided that the board of directors of the corporation adopts a resolution confirming use of such tax exemption for such project by such lessee. Such resolution shall include findings that (1) the project is a project of the corporation under R.I. Gen. Laws 42-64-3(p) and (2) it

> is in the interest of the corporation and of the project that legal title be held by the lessee from the corporation. In adopting any such resolution, the board of directors may consider any factors it deems relevant to the interests of the corporation or the project including, for example, but without limitation, reduction in potential liability or cost to the [EDC] or designation of the project as a "Project of Critical Economic Concern" pursuant to Chapter 117 of Title 42 of the General Laws.

(A-55 (emphasis deleted).)

R.I. Pub. L. 95-400 also established a mechanism under which the State will give a percentage of annual sales tax revenues received from the sales at the mall to the mall's private developers over a twenty-year period. The sales tax revenues will be escrowed according to a formula and was to be evidenced by a twenty-year note of the EDC. (A-51.) R.I. Pub. L. 95-400 also provided that "[s]ubject to annual appropriation by the General Assembly, the State shall pay to the EDC an amount equal to the annual payment which the EDC is required to make to the developer[.]" (A-53.)

The Petitioners filed their complaint and sought a declaration that the provisions of R.I. Pub. L. 95-400 which allowed the City of Providence to enter into a thirty-year tax treaty with the mall developer, which allowed the EDC to grant tax exemption to private entities, such as the mall developers, violated both the United States and Rhode Island Constitutions. Additionally, the Petitioners sought a declaration that the provisions for payments to

the developers out of the sales tax revenues generated at the mall violated the provision of the Rhode Island Constitution barring the General Assembly from pledging the credit of the State without the express consent of the people.

On the Respondents' motion to dismiss under R.I. R. Civ. P. 12(b)(6), the Superior Court ruled that the tax treaty provision of R.I. Pub. L. 95-400 did not violate the provisions of R.I. Const. art. XIII, § 4, which provide that the General Assembly has the power to act in relation to the property, affairs, or government of any city "by general laws which shall apply alike to all cities and towns," and the power to act as to the property, affairs, or government of a particular city or town, "provided that such legislative action shall become effective only upon approval by a majority of the qualified electors of said city or town voting at a general or special election." The Superior Court ruled that in order to state a claim for violation of this state constitutional provision, the legislation must not be one of statewide concern; because the General Assembly made findings that the mall development would have statewide impact, the tax treaty provision was not required to be submitted to the voters of the City of Providence under R.I. Const. art. XIII, § 4. (A-45 to A-48.)

As to the Petitioners' argument that R.I. Pub. L. 95-400 unconstitutionally delegated power to the EDC to confer tax exemptions, the Superior Court held that the standards accompanying the delegation of authority were sufficiently specific to comply with constitutional requirements. The court stated that the EDC's discretion was adequately constrained by the requirement that the project involved be one of the EDC and that it be in "the

interest of the [EDC]" to have title to property held by a lessee. (A-42 to A-43.)

The Superior Court also dismissed the Petitioners' claim that R.I. Pub. L. 95-400 effected an unconstitutional pledge of the credit of the State in violation of R.I. Const. art. VI, § 16. It stated that the bill's language itself provided that obligations issued thereunder "shall not constitute a debt, liability or obligation of the state . . . or a pledge of the faith and credit of the state," and noted that obligations incurred by the EDC are not considered obligations of the State. (A-39 to A-40.)

At the outset of issuing its oral rulings, the Superior Court also indicated that it was applying a standard to the Respondents' motion to dismiss for failure to state a claim which placed the burden of proof upon the Petitioners. Although the Superior Court recognized that a Rule 12(b)(6) motion generally should not be granted unless it is clear beyond doubt that, based upon the allegations of the complaint, the plaintiff can prove no set of facts in support of its claim, because legislation is generally presumed to be constitutional, the motion to dismiss before it would be treated differently. (A-26 to A-27.) It then stated that the claims challenging the constitutionality of R.I. Pub. L. 95-400 would be dismissed unless the Petitioners could demonstrate beyond a reasonable doubt that the challenged provisions were unconstitutional. (A-29.)

The Superior Court's order dismissing the complaint was appealed to the Supreme Court of Rhode Island by the Petitioners. Addressing the claim that the tax treaty provision was unconstitutional because the citizens of the City of Providence were not given the opportunity

to vote on whether the city should be authorized to enter into the contemplated treaty, the Supreme Court held that the power to authorize the City of Providence to enter into a thirty-year treaty was reserved to the General Assembly by R.I. Const. art. XIII, § 5, which generally provides that nothing in Article XIII should be deemed to grant to cities the power to levy, assess, or collect taxes or borrow money. The Supreme Court held that, despite the reservation to cities and their electors of the right to vote on legislation specifically affecting that city contained in R.I. Const. art. XIII, § 4, the provisions of Article XIII, § 5 authorized the tax treaty provision of R.I. Pub. L. 95-400. (A-9 to A-10.)

The Supreme Court went on to hold that R.I. Pub. L. 95-400 did not authorize the EDC to pledge the credit of the State in violation of R.I. Const. art. VI, § 16. Citing R.I. Gen. Laws § 42-64-23, the court held that this kind of obligation does not constitute a debt of the State or a pledge of the faith and credit of the State under the court's precedent. (A-14.) The court recognized, as argued by the Petitioners, that the State's credit rating may well be affected by the level of debt incurred by the EDC, thereby compelling the General Assembly to appropriate the funds necessary to pay the EDC note and making the EDC debt the functional equivalent of a pledge of the State's credit. But it held that because the General Assembly had the discretion whether to appropriate moneys for the fund or not, there was no pledge of the State's credit. (A-15 to A-16.)

The Supreme Court also affirmed with respect to the claims that R.I. Pub. L. 95-400 unconstitutionally delegated legislative power to the EDC. It found the standards accompanying the delegation of power clear, in

that the project involved must be one of the EDC and that it must be in the interest of the EDC that legal title be held by the lessee. (A-19 to A-20.)

The Supreme Court also upheld the Superior Court's decision to apply a "beyond a reasonable doubt" standard of proof against the Petitioners on the motion to dismiss. On appeal, the Petitioners alleged that use of this standard constituted error because the Superior Court essentially resolved any and all factual disputes against the Petitioners. The Petitioners argued that application of the beyond a reasonable doubt standard against a plaintiff on a motion to dismiss for failure to state a claim erected a barrier that few if any complaints challenging legislative enactments could surmount. The Supreme Court, citing *Chartier Real Estate Co. v. Chafee*, 101 R.I. 514, 565, 225 A.2d 766, 777-78 (1967), stated that "it was proper for the Superior Court to apply a 'beyond a reasonable doubt' standard in deciding whether the plaintiffs' challenge to the constitutionality of the Enabling Act should be upheld or rejected." (A-21 to A-22.)

ARGUMENT

THE RHODE ISLAND SUPREME COURT'S IMPOSITION, AT THE PLEADING STAGE, OF A "BEYOND A REASONABLE DOUBT" STANDARD UPON THOSE RAISING CONSTITUTIONAL CLAIMS HAS CREATED A NEARLY IRREBUTTABLE PRESUMPTION OF CONSTITUTIONALITY IN FAVOR OF ENACTMENTS OF THE RHODE ISLAND GENERAL ASSEMBLY, WHICH VIOLATES FEDERAL DUE PROCESS RIGHTS OF PETITIONERS AND OTHER LITIGANTS TO ACCESS TO THE COURTS OF THE STATE OF RHODE ISLAND.

In deciding to dismiss the Petitioners' claims that R.I. Pub. L. 95-400 was unconstitutional at the pleading stage and before any opportunity was given to present facts in support of the claims, the Superior Court relied upon the decision in *Chartier Real Estate Co. v. Chafee*, 101 R.I. 514, 565, 225 A.2d 766, 777-78 (1967), in which the Rhode Island Supreme Court stated that a party challenging the constitutionality of an act of the Rhode Island General Assembly has the burden of proving unconstitutionality "beyond a reasonable doubt." The Superior Court did so despite its recognition of the universally accepted rule that, in determining whether a complaint is sufficient to resist a motion to dismiss for failure to state a claim, all of the allegations of the complaint must be accepted as true, and the trial court

must find beyond any doubt that the plaintiff is not entitled to the relief sought. *See Ellis v. Rhode Island Public Transit Authority*, 586 A.2d 1055, 1057 (R.I. 1991) (on a motion to dismiss, a court should assume that allegations of the complaint are true, view them in a light most favorable to the plaintiff, and grant the motion only when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief). In affirming the Superior Court, the Supreme Court, also citing *Chartier*, specifically endorsed requiring a plaintiff in an action challenging the constitutionality of an act to prove his claim beyond a reasonable doubt at the pleading stage.

The drastic effect of the decision of the courts below to impose a beyond a reasonable doubt standard of proof upon the Petitioners specifically and Rhode Island litigants generally cannot be understated. Under the Rhode Island decision in this case, Rhode Island litigants attempting to enforce the most basic and fundamental of rights, i.e., those embodied in the state and federal Constitutions, are required to satisfy the most exacting standard of proof recognized in this nation's jurisprudence. While imposing this burden of proof as an ultimate matter upon a party seeking to overturn a statute as unconstitutional is not so extraordinary, this is not the effect of the decisions below. The Rhode Island Supreme Court instead imposed this beyond a reasonable doubt standard upon the Petitioners and ultimately upon all Rhode Island litigants who challenge the constitutionality of statutes at the *pleading stage* upon a motion to dismiss for failure to state a claim. The decision below not only embodies a sharp reversal of the normal rule that it must appear beyond a reasonable doubt that *no* claim exists before a motion to dismiss will be granted, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Ellis v. Rhode Island*

Public Transit Authority, 586 A.2d at 1057, but also imposes the beyond a reasonable doubt standard upon a litigant challenging the validity of a statute before there is an opportunity to submit evidence and factual materials in support of the claim.

Although states and state courts have the power to establish rules of procedure for the consideration of claims brought in those courts, this Court has recognized that such rules must be consistent with the guarantees of the Due Process Clause of the Fourteenth Amendment and the other guarantees of the federal Constitution enforceable against the states through that amendment. This Court recently reiterated this requirement in *Richards v. Jefferson County, Alabama*, 116 S. Ct. 1761, 1765 (1996), holding that a state court's application of rules of res judicata must be consistent with fundamental federal rights. This Court recognized there that "the guarantee of due process is not a mere form," *id.* at 1765, and that there are cases in which a state may not deprive individual litigants of their own day in court. Indeed, the *Richards* decision held that such cases include those challenging the constitutionality of a tax statute and noted that "we have previously struck down as a violation of due process a state court's decision denying an individual taxpayer any practicable opportunity to contest a tax on federal constitutional grounds." *Id.* at 1768.

In support of this point, this Court cited *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930), which declared unconstitutional a state court's decision overruling established state precedent that a litigant challenging the constitutionality of a statute must first seek an administrative remedy for its claim. The Court first held that denying the litigant the opportunity to

obtain relief constituted a violation of due process, and that there was no less a violation simply because the result was accomplished by the judiciary as opposed to the legislature. *Id.* at 679-80. While conceding the authority of state instrumentalities to declare the laws of the state, the decision went on to state as follows:

> Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense—whether it has had an opportunity to present its case and be heard in its support. . . . [W]hile it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

Id. at 681-82. Therefore, even though the Rhode Island courts in this case may have been applying a state rule in requiring that the Petitioners prove their constitutional claims "beyond a reasonable doubt" at the pleading stage, it still must appear that imposing such a standard is consistent with federal constitutional guarantees.

The imposition of the beyond a reasonable doubt standard at the pleading stage upon Rhode Island litigants seeking to vindicate and enforce constitutional rights is inconsistent with, and a violation of, the right of access to

courts embodied in the federal Constitution. As emphasized in *Brinkerhoff-Faris*, due process includes the guarantee of the opportunity to present a case in state court and be heard in support. *Id.* at 681. *Richards v. Jefferson County, Alabama*, 116 S. Ct. at 1768, similarly recognized that a "State may not deprive individual litigants of their own day in court." "The right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974).

The constitutional right of access to courts also derives from the right to petition the government for redress of grievances embodied in the First Amendment. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983). "Certainly the right to petition extends to all departments of the Government," and the right of access to courts is but one aspect of the right of petition. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

The right of access to courts does not consist simply of the pro forma right to file complaints in the courts; a state has an affirmative obligation to afford litigants "meaningful access" to the courts and allow them to present their case. *Bounds v. Smith*, 430 U.S. 817, 824 (1977). In *Boddie v. Connecticut*, 401 U.S. 371 (1971), this Court held unconstitutional a state rule requiring the payment of court fees and costs by indigents seeking to file divorce actions as a denial of the right of access to the courts, and in the course of so holding stated as follows:

> Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. . . .
>
> Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. A State, can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance, . . . or who, without justifiable excuse, violates a procedural rule requiring the production of evidence necessary for orderly adjudication . . . . What the Constitution does require is "an *opportunity* * * * granted at a meaningful time and in a meaningful manner," Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L.Ed.2d 62 (1965) (emphasis added), "for [a] hearing appropriate to the nature of the case," Mullane v. Central Hanover Bank & Trust Co., [339 U.S. 306, 313, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950)].

Id. at 377-78 (some citations omitted).

The Rhode Island courts' imposition of a "beyond a reasonable doubt" standard of proof upon litigants in its courts presenting constitutional claims violates the assurances of the First and Fourteenth Amendments that citizens will have a meaningful opportunity to present their

claims for judicial determination. This is starkly apparent in the instant case, especially with respect to the Petitioners' claim that R.I. Pub. L. 95-400 pledged the credit of the State of Rhode Island in violation of R.I. Const. art. VI, § 16, which precludes the pledge of faith or credit of the State for the payment of the obligations of others without the approval of the people of the State. The Petitioners alleged that, despite the disclaimer in the legislation, the provisions of R.I. Pub. L. 95-400 in which the General Assembly obligated itself to appropriate sales tax revenues toward the funding of the Providence Place Mall constituted a pledge of the State's credit. This was so, the Petitioners alleged, because in reality a future General Assembly could conceivably refuse to appropriate the sales tax funds toward funding the mall, *but only* at the cost of the complete destruction of the State's credit rating, and this circumstance would preclude the State from not appropriating the funds. Thus, whether there was an unconstitutional pledge of the State's credit arising from R.I. Pub. L. 95-400 could only be determined by an examination of the circumstances surrounding the legislation.

But the courts below pretermitted any examination of this issue and denied the Petitioners the opportunity to establish this and their other constitutional claims by requiring that the complaint itself demonstrate the claims beyond a reasonable doubt. To subject litigants raising constitutional claims to such a burden at the pleading stage certainly cannot be considered to afford "meaningful access" to the courts as required by the federal Constitution. A litigant must be afforded a "practicable opportunity" or "real opportunity" to contest the constitutionality of state legislation. *Richards v. Jefferson County, Alabama*, 116 S. Ct. at 1768-69; *Wolff v.*

McDonnell, 418 U.S. at 579. Under the beyond a reasonable doubt standard applied in this case, a Rhode Island litigant raising a constitutional challenge to legislation would be able to survive past the pleading stage only in those highly exceptional cases where the legislation is patently invalid. This state of affairs imposes a barrier that cannot be reconciled with the requirement of the federal Constitution that there be meaningful access to state courts.

The instant case is not unlike the extreme application of state res judicata principles found to be unconstitutional in *Richards v. Jefferson County, Alabama*. There the state court held that the petitioners' constitutional challenge to a state taxing statute was barred by res judicata because the statute's constitutionality had been upheld in a prior case brought by different parties. This Court reversed, holding that due process prohibited the state court from enforcing res judicata principles against persons who were neither parties to the prior action nor represented by the parties to the prior action. 116 S. Ct. at 1767-68. The *Richards* decision stressed that due process requires an individual to have a practicable opportunity to contest a statute on constitutional grounds, and held that to apply the prior decision upholding the statute to bar the petitioners' challenge "would thus be to deprive petitioners of their 'chose in action,' which we have held to be a protected property interest in its own right." *Id.* at 1769.

It was equally unconstitutional for the Rhode Island courts to require the Petitioners to prove, solely on the basis of their pleadings, their constitutional claims beyond a reasonable doubt. The Rhode Island courts did, in essence, the same thing done by the Alabama courts in

Richards; the courts below applied precedent in an extreme way so as to deprive the Petitioners of a meaningful opportunity to prove their claims. Application of the beyond a reasonable doubt standard against them on a motion to dismiss for failure to state a claim was the means by which the Petitioners were effectively denied access to the courts. Requiring the Petitioners' pleading alone to distinguish precedent and to demonstrate the unconstitutionality of R.I. Pub. L. 95-400 simply did not afford them a meaningful opportunity to contest that law's validity.

The conclusion that the decisions below deprived the Petitioners of their constitutional right of access to the courts cannot be avoided on the basis of the claim that there were no factual questions raised by their pleadings. The effect of the lower courts' decision is, in essence, the creation of an irrebuttable presumption that no facts exist that would support a claim seeking to enforce constitutional rights. This Court has often held such irrebuttable presumptions to be constitutionally disfavored. *Vlandis v. Kline*, 412 U.S. 441, 446 (1973). In *Heiner v. Donnan*, 285 U.S. 312, 329 (1932), the Court stated that it "had held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment." Denial of a fair opportunity to rebut the presumption of constitutionality is precisely the effect of the holding, that the Petitioners were required to prove beyond a reasonable doubt their constitutional claims at the pleading stage. The Rhode Island courts have declared that, whatever the facts of the particular case are or whatever facts may be developed by a claimant attempting to assert a constitutional right, the facts make no difference

unless the pleading itself demonstrates the validity of the claim beyond a reasonable doubt.

Indeed, the Rhode Island courts have essentially vested Rhode Island's General Assembly with the sole power to determine whether rights guaranteed to the state's citizens by its constitution can be exercised. In rejecting the Petitioners' argument that P.L. 95-400 constituted a pledge of the state's credit without voter approval in violation of R.I. Const. art. VI, § 16, the Rhode Island Supreme Court relied upon the recitation in P.L. 95-400 that the promise to the developers that they would be given future sales tax revenues was not a debt, liability, or obligation of the state. Under this ruling, the Rhode Island General Assembly has been granted the power completely to avoid the constitutional restrictions on pledging the state's credit simply by including boilerplate language disavowing the creation of any debt or pledge of credit, without regard to facts which show that a debt or pledge of credit is in fact created by the legislation. The General Assembly is allowed to create an irrebuttable presumption against a constitutional right because the Rhode Island courts will not inquire into the facts supporting the constitutional claim. The Rhode Island courts have abdicated their role as the ultimate defenders of constitutional principles, and litigants, instead of receiving the reasonable opportunity to vindicate constitutional guarantees they believe they will receive, will get only lip service from the Rhode Island courts. The court decisions below cede to the General Assembly the power to determine whether constitutional rights can be enforced in Rhode Island.

This situation surely violates the right of litigants to a reasonable opportunity to prove their claims, which right

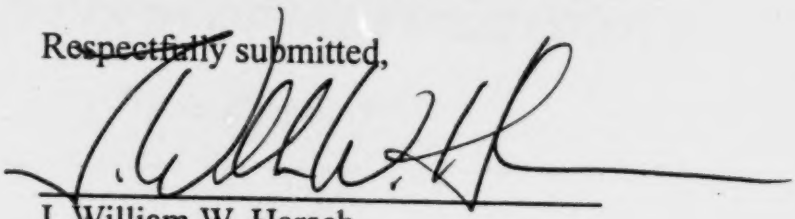
is protected by the federal Constitution's guarantee of access to the courts. No branch of a state government may, by *ipse dixit*, determine whether a constitutional right can be enforced. *Cf. Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). The suggestion in the Rhode Island Supreme Court's decision that no facts existed which would make any difference to the Petitioners' constitutional claim ignores the fact that this conclusion results from the decision to impose a "beyond a reasonable doubt" standard of proof at the pleading stage, and it creates an irrebuttable presumption of constitutionality. By preempting any factual development of the constitutional claims, the lower courts deprived the Petitioners of any real opportunity to assert rights granted by the Rhode Island Constitution.

As such, the Petitioners were deprived of their right of access to the state courts as guaranteed by the First and Fourteenth Amendments to the United States Constitution. Indeed, the decisions below, if allowed to stand, create a nearly insuperable obstacle for litigants seeking to enforce the provisions of the state Constitution. Application of the beyond a reasonable doubt standard in considering constitutional claims effectively deprives litigants of a judicial forum for those claims, a situation which this Court has noted raises a "serious constitutional question." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986). The Rhode Island courts' decisions in this case are contrary to universally applied notions of Anglo-American law, which allows claims to be dismissed solely upon the pleadings only where it appears beyond doubt that the plaintiff can prove no facts entitling him or her to relief, *Conley v. Gibson*, 355 U.S. at 45-46, and cannot be reconciled with the fundamental constitutional guarantee of access to courts.

CONCLUSION

For the reasons set forth above, the Petitioners respectfully request that this Court grant the Petition for Writ of Certiorari to the Rhode Island Supreme Court.

Respectfully submitted,



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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

WARWICK MALL TRUST, BLISS PROPERTIES, INC., AND IRVING SCHWARTZ,
PETITIONERS,

v.

THE STATE OF RHODE ISLAND, ET AL.,
RESPONDENTS.

On Petition for Writ of Certiorari to the Supreme Court of the State of Rhode Island

APPENDIX

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W0146 **Supreme Court**

No. 96-162-Appeal
(PC 95-6940)

Warwick Mall Trust, Bliss Properties, Inc. and Irving Schwartz :

v. :

The State of Rhode Island, the Honorable Lincoln C. Almond, in his capacities as Governor of the State of Rhode Island and Chairman of the Rhode Island Economic Development Corporation, and Providence Place Group :

ORDER

After examining the briefs submitted by the parties and hearing oral argument by counsel on July 19, 1996, the court enters the following order.

The judgment of the Superior Court dismissing the plaintiffs' complaint pursuant to Rule 12(b)(6) of the Rules of Civil Procedure of the Superior Court is hereby affirmed. An opinion setting forth the reasons for this order will follow.

Entered as an Order of this Court this 19th day of July, 1996.

By Order

/s/
Clerk

October 11, 1996

Supreme Court

No. 96-162-Appeal
(PC 95-6940)

Warwick Mall Trust et al. :

v. :

The State of Rhode Island et al. :

NOTICE: This opinion is subject to formal revision before publication in the Rhode Island Reporter. Readers are requested to notify the Technical Secretary, Supreme Court of Rhode Island, 250 Benefit Street, Providence, Rhode Island 02903, at Tel. 277-6588 of any typographical or other formal errors in order that corrections may be made before the opinion is published.

October 11, 1996

Supreme Court

No. 96-162-Appeal
(PC 95-6940)

Warwick Mall Trust et al. :

v. :

The State of Rhode Island et al. :

Present: Weisberger, C.J., Murray, Lederberg, Bourcier, and Flanders, JJ.

OPINION

Flanders, Justice. This appeal has challenged the constitutionality of legislation enacted by the Rhode Island General Assembly in 1995[1] authorizing the Rhode Island Economic Development Corporation (the EDC) and the city of Providence to enter into a long-term tax-exemption agreement with the developer of the proposed Providence Place Project (the Project), a large retail-shopping mall and parking garage to be located in Providence.

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[1]Public Laws 1995, ch. 400 (the Enabling Act). This legislation passed with the assent of over two-thirds of the members elected to each house of the General Assembly. Journal of the House of Representatives, Vol. 122, No. 76 at H.J.-19 (67 yeas and 33 nays); Journal of the Senate, Vol. 122, No. 77 at S.J.-24 (36 yeas and 13 nays).

The plaintiffs, Warwick Mall Trust and Bliss Properties, Inc., are the owner and the operator, respectively, of a shopping mall located in Warwick, Rhode Island. The plaintiff Irving Schwartz is a city of Providence voter and taxpayer. The defendants are the State of Rhode Island; Lincoln C. Almond, in his capacity as Rhode Island's Governor and as the chairman of the EDC; and the Providence Place Group Limited Partnership, a New York limited partnership that is the Project's developer.

The Superior Court entered a judgment dismissing plaintiffs' complaint for failing to state a claim upon which relief could be granted. Super. R. Civ. P. 12(b)(6). The plaintiffs then appealed from that adverse judgment, asserting the Enabling Act's unconstitutionality on the grounds that it violates the municipal voter-approval requirements of the home rule article,[2] constitutes an

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[2]Article XIII, section 4, of the Rhode Island Constitution declares:

> "The general assembly shall have the power to act in relation to the property, affairs and government of any city or town by general laws which shall apply alike to all cities and towns, but which shall not affect the form of government of any city or town. The general assembly shall also have the power to act in relation to the property, affairs and government of a particular city or town provided that such legislative action shall become effective only upon approval by a majority of the qualified electors of the said

illegal pledge of the state's credit by the EDC,[3] and improperly delegates tax-exempting legislative authority to the EDC.[4]

---

city or town voting at a general or special election, except that in the case of acts involving the imposition of a tax or the expenditure of money by a town the same shall provide for the submission thereof to those electors in said town qualified to vote upon a proposition to impose a tax or for the expenditure of money."

[3]Article VI, section 16, of our constitution states:

"The general assembly shall have no powers, without the express consent of the people, to incur state debts to an amount exceeding fifty thousand dollars, except in time of war, or in case of insurrection or invasion; nor shall it in any case, without such consent, pledge the faith of the state for the payment of the obligations of others. This section shall not be construed to refer to any money that may be deposited with the state by the government of the United States."

[4]Article VI, section 1, provides that "[t]his Constitution shall be the supreme law of the state, and any law inconsistent therewith shall be void. The general assembly shall pass all laws necessary to carry this Constitution into effect." Section 2 adds that "[t]he legislative power, under this Constitution, shall be vested

On July 19, 1996, after reviewing the parties' legal briefs, hearing their oral arguments, and considering their respective legal positions, we issued a brief order affirming the Superior Court's judgment dismissing plaintiffs' complaint.[5] We now set forth the reasons for our decision.

I

Because the General Assembly Retains Its Exclusive Power to Authorize Municipal Taxation and Borrowing, the Home Rule Article Does Not Require Local Voter Approval of the Enabling Act.

Despite the addition of the home rule article to Rhode Island's Constitution in 1951, cities and towns remain powerless "to levy, assess and collect taxes or to borrow money, except as authorized by the general assembly." R.I. Const., art. XIII, sec. 5.[6] The Enabling Act authorizes the city of Providence to enter into a long-term tax-treaty agreement with the developer of the

---

in two houses, the one to be called the senate, the other, the house of representatives* * *."

[5]We assumed without deciding that plaintiffs had standing to mount this constitutional attack on the Enabling Act.

[6]Article XIII, section 5, states that "[n]othing contained in [article XIII] shall be deemed to grant to any city or town the power to levy, assess and collect taxes or to borrow money, except as authorized by the general assembly."

Project. Pursuant to the proposed tax treaty, the developer's payments in lieu of taxes are earmarked for the Project's debt service and are amortized over a thirty-year period. A municipality's power to negotiate for payments of this kind from property owners located within its jurisdiction and its power to abate such payments, to allocate them for certain purposes, or to exempt certain property in whole or in part from municipal taxation are all actions derivative of and subsumed by its basic authority vel non to levy, to assess, and to collect taxes. See, e.g., Crafts v. Ray, 22 R.I. 179, 183, 46 A. 1043, 1043 (1900) (noting that the "power to tax necessarily implies a power to exempt"). If a city or a town cannot levy, assess, and collect taxes without General Assembly authorization, then it certainly cannot abate, exempt, or allocate payments it would otherwise be entitled to receive as taxes (or to negotiate for their receipt as payments in lieu of taxes) without such authorization.[7]

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[7]We note, for example, that G.L. 1956 § 44-3-9 provides in part:

> "(a)(1) Except as hereinafter provided, the electors of any town qualified to vote on a proposition to appropriate money or impose a tax when legally assembled, may vote to authorize the town council of the town, for a period not exceeding ten (10) years, and subject to the conditions as hereinafter provided, to exempt from payment, in whole or in part, real and personal property used for manufacturing, or commercial purposes, or to determine a stabilized amount of taxes to be paid on account of the property,

If consummated, the proposed tax treaty contemplated by the Enabling Act would effectively exempt the Project's real and personal property from municipal taxation for over thirty years. It would do so by earmarking what would otherwise constitute payments in lieu of taxes for debt-service payments to the Project's lenders. In any event the city's ability "to levy, assess and collect taxes or to borrow money" with respect to the Project will be affected by this legislation for the foreseeable future. Accordingly we deem the Enabling Act to fall within the General Assembly's exclusive reserved power to authorize local taxation pursuant to article XIII, section 5, of the Rhode Island Constitution.

Despite the tax-enabling features of this legislation, plaintiffs still argued that because the Enabling Act remained an act "in relation to the property, affairs and government" of a particular home-rule city or town (namely, the city of Providence), it could "become effective only upon approval by a majority of the qualified electors of the said city or town voting at a general or special election * * *." R.I. Const., art. XIII, sec. 4.

> notwithstanding the valuation of the property or the rate of tax; * * *
>
> "* * *
>
> "(b) Cities shall have the same authority as is granted to towns except that authority granted to the qualified electors of a town and to town councils shall be exercised in the case of a city by the city council."

Although this appears at first blush to be a plausible reading of sec. 4 of the home rule article, that section cannot be read in isolation from sec. 5 of this same article. In construing sec. 5, this court has already opined that, notwithstanding a municipality's adoption of a home rule charter, the General Assembly still retains "its exclusive power to legislate by general or special acts in granting to a city or town authority 'to levy, assess and collect taxes or to borrow money * * *.' this power is expressly reserved to the General Assembly under section 5 of said article [presently section 5 of article XIII]." (Emphasis added.) Opinion to the House of Representatives, 79 R.I. 277, 280, 87 A.2d 693, 696 (1952).

If, as plaintiffs have contended, local voters in a home-rule city or town like Providence still have the right to approve any specific tax-enabling legislation enacted by the General Assembly pertaining to their municipality, then the Legislature would be powerless to pass such laws without first obtaining local voter approval. However, this result would be inconsistent with the conclusion we reached in Opinion to the House of Representatives that the General Assembly retains the exclusive power to authorize local taxation by general or special acts. Id. Instead of the General Assembly's retaining an exclusive power to authorize municipal taxation in any particular city or town as provided for in sec. 5, its sec. 5-enabling power would be a shared, conditional, and nonexclusive one. Just as a municipality could pass no local tax legislation without General Assembly authorization, the General Assembly could pass no local tax-enabling laws without local voter approval. Such a prescription for local tax gridlock would be at odds with article XIII, section 5's refusal to grant cities and towns any power with respect to

local taxation except as authorized by the General Assembly.

Moreover, if plaintiffs' constitutional interpretation were correct, then municipal voters in home-rule cities would be empowered to veto any local tax-enabling laws enacted by the General Assembly. Far from being powerless and dependent on General Assembly authorization to act on local tax issues, each city or town, through its municipal voters, could stymie the General Assembly's exercise of its exclusive power to pass "special acts in granting to a city or town authority 'to levy, assess and collect taxes or to borrow money * * *.'" Opinion to the House of Representatives, 79 R.I. at 280, 87 A.2d at 696.

Mindful that "to tax and to please, no more than to love and be wise, is not given to men,[8] we have declined to adopt this interpretation. To do so would conflict with our constitution's exclusive allocation to the General Assembly of the legislative power to authorize any city or town to levy, to assess, and to collect local taxes and with the rationale of our earlier decision in Opinion to the House of Representatives, which we hereby affirm as it bears on the issues raised by this appeal.

In the famous case of McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 4 L. Ed. 579 (1819), Chief Justice John Marshall spoke to this very point in fixing the distribution of the taxation power between a general and

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[8]Edmund Burke, Speech on American Taxation (Apr. 19, 1774), in 2 The Writings & Speeches of Edmund Burke 67 (1901).

a local governmental authority. In rejecting the State of Maryland's attempt to tax a national bank, Chief Justice Marshall uttered these memorable words:

> "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied." Id. at 431, 4 L. Ed. at 607.

In matters pertaining to the authorization of municipal taxation and borrowing, our constitution declares the General Assembly to be supreme over any municipality's attempts to go it alone or to exert control over state legislative initiatives through home-rule measures such as local voter approval. R.I. Const. art. XIII, sec. 5. Thus, pursuant to our advice in Opinion to the House of Representatives (a decision rendered just one year after Rhode Island adopted the home rule article), we reaffirm that under the Rhode Island Constitution, the General Assembly retains its plenary power to enact special tax-enabling laws in relation to a particular city or town, notwithstanding that municipality's adoption of a home rule charter. And it can do so without having first to obtain the voters' approval in that home-rule municipality because local tax-enabling acts, like the one at issue here, that affect a city's power to levy, to assess, and to collect property taxes or to borrow money are not subject to

article XIII, section 4's requirement of local voter approval.[9]

Given our holding that the Enabling Act is not subject to the local voter-approval provisions of the home rule article because of its status as municipal tax-enabling legislation, there is no need for us to reach any of the other arguments advanced by the parties in regard to the question of whether the legislation is subject to any of these provisions.

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[9]Section 4 of the home rule article does provide that "in the case of acts involving the imposition of a tax or the expenditure of money by a town the same shall provide for the submission thereof to those electors in said town qualified to vote upon a proposition to impose a tax or for the expenditure of money." However, because the Enabling Act merely "authorize[s]" the EDC and the city of Providence to enter into a tax treaty on terms that "both the EDC and the City * * * deem advisable," P.L. 1995, ch. 400, § 1 (enacting § 42-63.5-3), it does not involve "the imposition of a tax or the expenditure of money by a town, as distinguished from a city * * *." Opinion to the House of Representatives, 79 R.I. 277, 280, 87 A.2d 693, 696 (1952). Thus it does not come within the tax-imposition or money-expenditure-by-a-town provision of article XIII, section 4, but instead falls within the General Assembly's reserved section 5-power to authorize particular municipalities to act on local tax matters.

II
The Challenged Legislation Does Not Authorize the EDC to Pledge the Credit of the State.

We also hold that the Enabling Act does not authorize the EDC to pledge the credit of the state in violation of the Rhode Island constitutional provisions set forth in article VI, section 16 (requiring a majority of the qualified electors of the state to approve state debts over $50,000), nor is there anything in this law that pledges the faith and credit of the state for the payment of the obligation of others.

By law, this type of obligation issued by the EDC under its enabling statute "shall not constitute a debt, liability or obligation of the state or of any political subdivision thereof other than the [EDC] or a pledge of the faith and credit of the state or any political subdivision other than the [EDC]." General Laws 1956 § 42-64-23. We have repeatedly opined that when this or similar disclaimer language is used, debt obligations issued by public corporations like the EDC do not pledge the faith and credit of the state or create a debt enforceable against the state and that, therefore, these public entities are not constitutionally barred from entering into such obligations. See In re Advisory Opinion to the Governor (DEPCO), 593 A.2d 943, 950-51 (R.I. 1991) (Rhode Island Depositors Economic Protection Corporation): In re Advisory Opinion to the Governor: Public Drinking Water Protection Act of 1987, 556 A.2d 1000, 1001 (R.I. 1989) (Rhode Island Water Resources Board); Opinion to the Governor, 112 R.I. 151, 156-57, 308 A.2d 809, 812 (1973) (Rhode Island Housing and Mortgage Finance

Corporation); Opinion to the Governor, 107 R.I. 651, 655, 270 A.2d 520, 522 (1970) (Rhode Island Water Resources Board); see also Advisory Opinion to the Governor, 113 R.I. 586, 590-91, 324 A.2d 641, 641-45 (1974) (EDC's predecessor, the Rhode Island Port Authority and Economic Development Corporation).

Indeed, in our 1974 advisory opinion concerning the bonds issued by the EDC's predecessor corporation, we concluded that use of the same capital-reserve funding mechanism contained in section 1 of the Enabling Act did not pledge the credit of the state or create a state obligation. Advisory Opinion to the Governor, 113 R.I. at 590-91, 324 A.2d at 644-45. We also opined that the mere creation of a capital reserve fund provision as described in § 42-64-18(d) "did not constitute the incurring of a debt or pledge of the state's credit because the General Assembly retained its right" to refuse to contribute to any capital reserve fund that may be established by failing to appropriate moneys for this program. 113 R.I. at 591, 324 A.2d at 645.

Our bedrock rationale for all these opinions is that public corporations of the state have "a distinct legal existence from the state and [do not constitute] a department of state government." See, e.g., § 42-64-4(a) (discussing the EDC). Although payments to the Project's developer are to be secured for a term not exceeding twenty years by a so-called capital-reserve fund to be established by the EDC, the General Assembly is under no legal compunction to make any annual appropriation to fund this capital-reserve account, and no creditor can force the state to do so. Thus, because the General Assembly, year in and year out, "still retains its right to concur or disagree" with the proposed funding of this reserve

account, the statute "in no way constitutes an unconstitutional incurrence of a debt or a pledge of the state's credit. See Opinion to the Governor, 112 R.I. at 157, 308 A.2d at 812; see also Advisory Opinion to the Governor, 113 R.I. at 591, 324 A.2d at 645.

Although the state's credit rating as determined by various bonding agencies and financial authorities may well be affected by the level of debt incurred by a public corporation like the EDC and by its capital-reserve-fund provisions that are intended as security for such obligations, these allegations, even if proven, would not convert these public-corporation obligations into state debts or pledges by the state of its faith and credit. This is so because the challenged provisions neither create any legally enforceable obligation or debt collectible from the state nor pledge as a matter of law the faith or the credit of the state to secure such debts.

In the future, it may well be that as a practical matter (and depending on its then-existing priorities) the General Assembly will be strongly inclined to fund whatever capital-reserve-fund payments are contemplated by the Enabling Act—especially if its failure to do so would adversely affect the state's credit ratings—but "the controlling factor is not whether the legislature will exercise its discretion in a given manner, but rather whether the right of discretion exists." Opinion to the Governor, 97 R.I. 200, 206-07, 196 A.2d 829, 832 (1964). Here, that discretion to fund or not to fund plainly exists.

For these reasons we have rejected plaintiffs' argument that the Enabling Act is invalid under article VI, section 16, of the Rhode Island Constitution for not having been approved by voters in a statewide referendum.

III

The Challenged Legislation Does Not Improperly Delegate Legislative Power.

Section 4 of the Enabling Act (amending § 42-64-20(c)) allows the EDC to authorize its statutory tax exemption to be used by a lessee or sublessee of the corporation's properties.[10] The plaintiffs have argued that

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[10]Section 4 of the Enabling Act provides in pertinent part:

> "For purposes of the exemption from taxes and assessments upon or in respect of any project under subsections (a) or (b) of this section, the corporation shall not be required to hold legal title to any real or personal property, including any fixtures, furnishings or equipment which are acquired and used in the construction and development of such project, but such legal title may be held in the name of a lessee (including sublessees) from the corporation. Such property, which shall not include any goods or inventory used in such project after completion of construction shall be exempt from taxation to the same extent as if legal title of such property were in the name of the corporation, provided that the board of directors of the corporation adopts a resolution confirming use of such tax exemption for such project by such lessee. Such resolution shall include findings that

this delegation to a public corporation of the Legislature's power to exempt property from taxation is too broad and standardless to pass legal muster. We disagree.

Before a lessee or sublessee of the EDC can take advantage of these tax-exempt provisions, the EDC must first adopt a resolution that contains the following specific findings: "(1) the project is a project of the [EDC] under R.I. Gen. Laws § 42-64-3(p) and (2) it is in the interest of the [EDC] and of the project that legal title be held by the lessee from the corporation." See, supra, note 10. In considering whether to make such findings, the EDC's board of directors is expressly empowered to consider "the interest of the corporation and of the project."

When reviewing the Legislature's delegation of any of its powers, we must interpret the provisions in light of the act as a whole and in conformity with the purposes of the EDC. See Davis v. Wood, 427 A.2d 332, 336 (R.I.

> (1) the project is a project of the corporation under R.I. Gen. Laws 42-64-3(p) and (2) it is in the interest of the corporation and of the project that legal title be held by the lessee from the corporation. In adopting any such resolution, the board of directors may consider any factors it deems relevant to the interests of the corporation or the project including, for example, but without limitation, reduction in potential liability or cost to the corporation or designation of the project as a 'Project of Critical Economic Concern' pursuant to Chapter 117 of Title 42 of the General Laws."

1981) ("[i]n determining whether a statute contains sufficient standards, we must read the act as a whole; the provision in question should not be isolated, but must be construed with reference to the entire act"). Among the purposes of the EDC are "[t]o promote and encourage the preservation, expansion, and sound development of new and existing industry, business, commerce, agriculture, tourism, and recreational facilities in the state, promoting thereby the economic development of the state and the general welfare of its citizens." Section 42-64-5(c), as amended by 1995, ch. 370, art. 12, § 8. Although the standards for authorizing a tax exemption are broadly drawn, when interpreted in light of the EDC's statutory purposes, they serve to guide and to constrain the EDC in the exercise of its authority to permit property held in the name of a lessee or sublessee to be tax exempt (to the same extent as if legal title where held by the EDC).

Moreover, the mere fact that the Enabling Act is contingent on the approval, the execution, and the delivery of specified agreements between the EDC and the Project developer does not impermissibly delegate legislative power. The entry into these agreements is simply part of the process whereby the EDC carries out its delegated powers pursuant to the standards and the purposes set forth in the legislation.

Because we have already twice approved the General Assembly's delegation of powers to the EDC and its subsidiary entities as "constitutionally permissible,[11] we

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[11]See In re Advisory Opinion to the Governor (Rhode Island Airport Corporation), 627 A.2d 1246, 1252 (R.I. 1993); Advisory Opinion to the Governor, 113 R.I. at

need only repeat what was said before: "We see no reason to reexamine this issue * * *" In re Advisory Opinion to the Governor (Rhode Island Airport Corporation), 627 A.2d at 1252.

Here, the function that has been delegated—determining the tax-exempt status of certain economic-development projects—is certainly important but nonetheless narrow. The standards accompanying the delegation are also clear: the project in question must be an EDC project, and it must be in the interest of the EDC and the project that legal title be held by the lessee. These determinations must be made in light of the practical, project-specific considerations that are consistent with EDC's economic-development purposes. And finally, the safeguards provided in the Administrative Procedures Act may, in certain circumstances, serve to check potentially arbitrary EDC action. See id. at 1253.

Our approach to legislation like this, which has been challenged for an alleged lack of a proper delegation of legislative authority, is a utilitarian one. We evaluate such challenges in light of the practical recognition that a modern Legislature has a frequent need "to utilize an administrative agent to accomplish the purpose of the legislation * * *." J.M. Mills, Inc. v. Murphy, 116 R.I. 54, 61, 352 A.2d 661, 665 (1976). Here, the Enabling Act reflects a legislative decision that the EDC, as an administrative agent, can best decide whether to allow a tax exemption to be used for particular EDC projects in which property is held in the name of a lessee. This is exactly the kind of fact-specific, market-oriented, project-

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596, 324 A.2d at 647.

by-project determination in which such a legislative power may be delegated most expediently to an administrative agent, especially when the General Assembly retains the power not to fund the capital-reserve account that secures the Project's debts. In any event we see no constitutional reason to second-guess that legislative judgment.

Conclusion

We have carefully considered these and each of the other arguments raised by the plaintiffs in their appeal, and we find them to be unpersuasive. Here, there were no material facts in dispute that were outcome determinative.[12] Thus, even in ruling on the defendants' motion to dismiss, see Super R. Civ. P. 12(b)(6), it was proper for the Superior Court to apply a "beyond a reasonable doubt" standard in deciding whether the plaintiffs' challenge to the constitutionality of the Enabling Act should be upheld or rejected. See, e.g., Chartier Real Estate Co. v. Chafee, 101 R.I. 544, 565, 225 A.2d 766, 777-78 (1967) (since plaintiffs failed to carry their burden of establishing "beyond a reasonable doubt" that, as a matter of law, certain legislation was unconstitutional, the

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[12]Even assuming that the plaintiffs would have been able to prove at trial that as a practical matter the financial community, or some significant constituents thereof, may consider the obligations in question to be a pledge of the state's credit or a de facto state debt, this proof would not matter for the purposes of this decision because from a legal standpoint these obligations simply do not fall into that category and no court would be entitled to enforce them as such.

trial justice did not err in granting defendants' motion to dismiss).

For the reasons previously stated, we have affirmed the judgment of the Superior Court and denied and dismissed the plaintiffs' appeal.

STATE OF RHODE ISLAND SUPERIOR COURT
PROVIDENCE, SC.

WARWICK MALL TRUST, BLISS PROPERTIES, INC., and IRVING SCHWARTZ Plaintiffs	:	P.C. No. 95-6940
v.	:	
STATE OF RHODE ISLAND, and the HONORABLE LINCOLN C. ALMOND, in his capacities as Governor of the State of Rhode Island and Chairman of the Rhode Island Economic Development Corporation, and PROVIDENCE PLACE GROUP LIMITED PARTNERSHIP Defendants	:	

ORDER

This matter came for a hearing before the Honorable Thomas Needham on February 28 and 29, 1996, on Defendants' Motion to Dismiss and on the Motion of the Attorney General to Certify Issues to the Supreme Court. Upon consideration thereof, it is hereby

ORDERED

1. The Attorney General's Motion to Certify is denied.

2. Plaintiffs' complaint is dismissed with prejudice as to all counts.

3. Judgment shall be entered for Defendants.

SO ORDERED: ENTER:

/s/ Thomas H. Needham /s/

Judge Thomas H. Needham Clerk

March 4, 1996

SUBMITTED BY:

/s/ Lisa Dinerman

Lisa Dinerman #2689
Special Assistant Attorney General
72 Pine Street
Providence, Rhode Island 02903
401/274-4400 ext. 2357

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Order to be forwarded to all counsel of record, postage prepaid, this 4th day of March, 1996.

/s/ Lisa Dinerman

RECEIVED MAR 26, 1996

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. SUPERIOR COURT

WARWICK MALL TRUST, BLISS PROPERTIES, INC., AND IRVING SCHWARTZ) COPY

vs.) PC/95-6940

THE STATE OF RHODE ISLAND, ET AL)

HEARD BEFORE MR. JUSTICE THOMAS H. NEEDHAM
FEBRUARY 28 and 29, 1996

APPEARANCES:

J. WILLIAM HARSCH, ESQUIRE ..... FOR THE PLAINTIFFS.
JOHN MARKS, ESQUIRE ..... FOR THE PLAINTIFFS.

LISA DINERMAN, ESQUIRE
SPECIAL ASSISTANT ATTORNEY GENERAL ..... FOR THE STATE.

JOSEPH S. LARISA, ESQUIRE
EXECUTIVE COUNSEL TO THE GOVERNOR ... FOR THE DEFENDANT.

MARK A. POGUE, ESQUIRE ..... REPRESENTING THE INTERVENER, PROVIDENCE PLACE GROUP.

JOHN G. KESTER, ESQUIRE ..... COUNSEL ADMITTED PRO HAC VICE ON BEHALF OF THE INTERVENER.

MICHELE M. SNIZEK, RPR
COURT REPORTER

* * *

There was a case that I took up this morning when I arrived that I'd like some comments on as it relates to a 12(b)(6) motion, and what the Supreme Court is attempting to say to the trial court. That case is Chartier. The Supreme Court in Chartier Real Estate Company, Incorporated vs. John H. Chaffee, the case is in 225 Atlantic Reporter 2d 766. In that case there was a act of the General Assembly that indicated that a referendum would be submitted for approval to the voters providing for the issuance of five million dollars in bonds for the acquisition of land for the recreation and conservation purposes. The matter came before Judge Carrellas, and Judge Carrellas at the trial level denied the prayer for permanent injunction and he dismissed the complaint. There was an appeal that went to the Supreme Court. The Supreme Court addressed the issues raised in that complaint, and this is the language that follows, the very end of the opinion, "In our judgment the plaintiffs have not sustained their burden of proving beyond a reasonable doubt that Chapter 169 is unconstitutional, and therefore have failed to state a claim against the defendants which relief may be granted. We hold accordingly that the trial justice did not err in denying the plaintiff's prayer for a permanent injunction and granting the defendant's motion to dismiss."

I'm troubled about that language that was used in that case. The standard, the test on a motion to dismiss seems to run contra to that. In other words, a motion to dismiss would be denied if the Court can, in inspecting the

complaint, not say to itself there is no basis. I have conviction beyond a reasonable doubt that this plaintiff cannot sustain relief from this defendant under the complaint. Mr. Justice Carrellas, evidently, in dismissing the complaint, came to that conclusion. But when the Supreme Court reviewed it, the Supreme Court seems to have placed the burden on the plaintiff to show that the statute is unconstitutional.

What I have before me in the first instance is a 12(b)(6) motion. Applying the standard test to that, I test the sufficiency of the complaint against that standard. Would someone like to comment as to whether or not the plaintiff at this time on this motion must convince me of the unconstitutionality of the statute in order to remain in the arena, so to speak? Or, stated another way, on a 12(b)(6) motion, does the presumption of constitutionality have to be overcome in order to defeat the motion for a 12(b)(6) dismissal? I'm going to leave you with that thought for a moment and I'm going to take a—stay where you are. I'm going to take a short trip in my chambers, but stay where you are. Do not get up.

(Brief pause)

THE COURT: Let me continue with my thought as it involves why this case disturbs me. When we had our chambers conference, I suggested that since motions to dismiss had been filed, that we should handle those motions to dismiss. Most of your briefs and memoranda, particularly as it relates to Count 1 and Count 2, read like a brief, on both sides, for and against a motion for

summary judgment. There's one thing lacking, of course, and I haven't seen any stipulation, but I think you treat in your briefs the fact that no election has taken place in Providence or will take place in Providence, and there's no statewide election that will take place, and you present a very exhaustive brief and memoranda which reads as though one is in favor of a motion for summary judgment and another is opposed to it. So I asked myself earlier, considering your motions, as to whether or not a 12(b)(6) motion brings before me a phase of the case which reaches the constitutionality of the enactment. Ordinarily, a 12(b)(6) motion is merely a test on pleading and it's a very very low hurdle that the plaintiff has to get over, until I read this case, and when I read this case, and it's an older case—John Chafee hasn't been governor since the late 60's; the case, I believe, was a 1967 case—but the Supreme Court seems to say on appeal that the plaintiff did not sustain his burden of proving that the act was unconstitutional. Therefore, the judge did not err in dismissing it. I originally did not think that a 12(b)(6) motion presented a phase of the case which would bring the constitutionality of the enactment before me. There's no question on a motion for summary judgment, that phase of the case certainly would bring the constitutionality of the enactment before me. In the Weiner case, I can't remember the other party, but it was a case involving an action by Bill McKenzie, Judge McKenzie. He was faced with a motion to certify the question to the Supreme Court. And in the old days when he didn't have the kind of filing we have, we had little bundles, and the Supreme Court, when it got the certification mentioned in its decision the docket entry and so forth and so on, came to the conclusion there was nothing before the trial justice at the

time he granted the motion for certification, taking the position that there must be some phase of the litigation before him which would give rise to his having to decide the constitutionality of the matter which he certified. I think a fair reading of the Chartier case seems to say by necessary implication that when judge Carrellas granted the motion to dismiss, that the constitutionality was before him at that particular time. He denied the injunctive relief and granted the motion to dismiss. That case, like this one, is perhaps pretty close to being on all fours; an act of the General Assembly was involved, it was alleged to be unconstitutional, and there was a prayer for permanent, preliminary and permanent injunction, and I would assume that there were no factual disputes. The act was just presented to the justice and he denied the prayer for injunctive relief, and dismissed the action. When it got to the Supreme Court, they said the plaintiff had not shown below beyond a reasonable doubt that the act was unconstitutional, and therefore, we approve of what he did.

In reading that, I perhaps have to take a second look at what I originally thought was merely a pleading stage, and that in deciding whether the complaint would not be susceptible of a factual or a legal basis for relief against the defendant; that I wasn't reaching the constitutional question. I will tell you here and now I have decided to dismiss some of the complaints. Is there anyone that has read the case that would like to comment on it?

MR. LARISA: Your Honor, I haven't read the case recently, but I'd like to comment on a couple of points, if I may. I think what's troubling the Court here, your

Honor, is the distinction in this case between, with respect to a 12(b)(6) motion when facts are in dispute, and when the same motion presents a pure question of law. It is clear that a 12(b)(6) motion, when there are no facts in dispute, can be granted on constitutional questions, and this Court and the Supreme Court do that everyday, and they affirm them everyday. Take an easy example: Say these plaintiffs instead of alleging the present case, were alleging the state income tax was unconstitutional, and the Attorney General was here today arguing on a 12(b)(6) motion to dismiss; that that case was decided long ago, and should be dismissed as a matter of law immediately. There are no facts in dispute. I think we'd all agree that there's no question that there's no reason to delay ruling on that. The Court has the authority and would immediately enter a 12(b)(6), grant the motion to dismiss on that claim.

We submit that this case is no different, and that Chartier correctly explains what the law is with respect to a 12(b)(6) motion to dismiss. The plaintiff in this case has raised constitutional issues. There are no facts in dispute. All that this Court is asked to do is to take P.L. 400 law, take each of the constitutional provisions that the plaintiffs invoked in their complaint, along with the case law that accompanies those provisions, and decide as a pure matter of law whether any of those provisions under any facts potentially relevant to resolution of this matter could result in a finding of unconstitutionality. The defendant's briefs in this matter address exhaustively how, one, it conceded on Count 1 there are no factual disputes; it's a pure examination of law, so it really is no different than the income tax example; and two, with respect to the other

counts, the plaintiffs have raised no factual disputes that are relevant to this Court's resolution of the pure constitutional issues. They raised a few factual issues; such as, an expert affidavit regarding what full faith and credit means. We provided a plethora of case law which says that issue is already resolved; and therefore, since that fact is entirely irrelevant, we submit to your resolution of the constitutional claim you are perfectly entitled and should enter a 12(b)(6) motion to dismiss on that claim and that pattern follows throughout all counts, one through eight, so we don't view Chartier as really having much of any bearing here because whether the burden is on them to prove beyond a reasonable doubt, or on us to prove that they have failed to state a claim, it's a simple matter of taking the counts of the complaints, the constitutional provisions they cite, putting them with the statute, and deciding as a pure question of law whether or not those provisions state a cause of action that would defeat a motion to dismiss.

MR. MARKS: Mr. Larisa uses the example of a complaint challenging the state income tax at this late date. That brought to mind a case, the style of which I do not recall, but I certainly remember when it was decided. It was more than twenty years ago, and it was decided by Judge Pettine, and that was a case in 1974 challenging enactments of the General Assembly of the state of Rhode Island allegedly impinging upon the so-called privacy right inherent allegedly in abortions. My recollection back from 1974 is that Judge Pettine said there are certain legislative enactments for which the presumption of constitutionality can be overrided simply by reading them,

and it was my recollection that Judge Pettine granted the plaintiff's complete relief before the defendant's had had an opportunity to answer the complaint.

So perhaps we can posit two kinds are bubbles. You have your stainless steel bubbles like the income tax and all the law construing it saying it's constitutional, and when somebody brings a complaint seeking to overturn the income tax on constitutional grounds, they find that the presumptions of constitutionality is unburstable. It's stainless steel. No matter how hard you hit it, it isn't going to burst. However, you think your run of the mill statute, specially one that impinges upon fundamental rights; such as, the franchise for voting, certainly we're well aware and agree that there is a presumption of constitutionality for any legislative enactment that is formal upon its face. I also have not read the Chartier case in some weeks. There was, as I recall, quite a few cases involving Governor Chafee and the various constitutional challenges to his conservation initiative. Frankly, they have all begun to blur together, but I think you have a situation where the presumption of constitutionality is akin to one of those burstable bubble presumptions of the plaintiff who comes in and says, as we do here, that we have a general enabling act which enables every city and town in the state of Rhode Island to enter into tax treaties for ten years, and then the General Assembly goes and creates a category of one. That category is the city of Providence. The city of Providence is enabled to get into a tax treaty for 30 years. I think the presumption has been burst, and I'd like to suggest that if the mechanism doesn't work in that way, or in some functional equivalent, then I'd be so bold as to say

that that language in Chartier was a slip of the pen that has not been followed in Rhode Island constitutional jurisprudence since then because it would create an insurmountable hurdle for the plaintiff who wishes to prove that the disparate impact of the statute that is regular and unobjectionable on its face. How can you prove beyond a reasonable doubt a disparate impact case if that's your burden at the pleading stage? It just can't can reconciled with the pass 20 odd years of constitutional litigation jurisprudence in Rhode Island. That's all I have to say, except for the fact that we probably would agree that once you establish that there has been no election in Providence, that Count 1 is ripe for summary judgment. But regarding Count 2, we think that there are material facts in dispute, not just facts in dispute, but material facts in dispute, and to my knowledge the issue of the full faith and credit of what we can call hostage-taking argument, was not brought before the DEPCO Court. Thank you, your Honor.

MR. KESTER: Your Honor, if I may, I have three points. First, the Court, I believe, reads the Chartier case quite correctly. Chartier does have bearing, and I don't understand the State to say otherwise. What we can say about what Chartier says is that it represents a typical instance in which on a 12(b)(6) motion if a plaintiff comes in with a complaint that doesn't state a legal claim, that complaint is dismissed. It could be dismissed for failure of pleading. We recognize novice pleadings allow pleaders quite a bit of leeway, but if the complaint simply doesn't comply with the requirements to state a legal claim, it's dismissed under 12(b)(6), and if a plaintiff

comes in and says an act of the General Assembly is unconstitutional, and the cases are there as they are, that show that this law is plainly constitutional, then what is called for is a dismissal under 12(b)(6). It doesn't have to be a pleading here. This is a failure to state a claim as a matter of law.

Second point, I confess I didn't understand what my friend said about bubbles. I don't think this case is about bubbles. I think this case is about Rule 12(b)(6) and the fact that under the constitutional law of Rhode Island and the United States this complaint doesn't stand up. They haven't made claim. And I think they recognize that, your Honor, because what I heard Mr. Marks kind of hinting at and slipping around as he was talking here, is stated much more starkly in the plaintiff's papers on Page 4 of their memorandum, they say, and I'm quoting, it says, "The usual presumption of constitutionality should not apply." Now, your Honor, I've been involved in constitutional cases in state and federal courts for, I guess, 25 years now. I have never been before a court in a constitutional case where the challengers were telling the Court to abandon or reverse the presumption of constitutionality. And I would say further, your Honor, I don't think I have ever been in a jurisdiction that has as strong a presumption of constitutionality as the state of Rhode Island because the state of Rhode Island, as the Court well knows, and as the Court indeed pointed out to all of us, doesn't just state the acts of the General Assembly are presumed constitutional. Rhode Island says the acts of the General Assembly are presumed constitutional unless they are shown otherwise beyond a reasonable doubt. This complaint doesn't do

that. It doesn't begin to do that, your Honor, on any of the counts, and the entire complaint on that basis alone could be dismissed.

Apart from that, of course, as the Court is well aware, there's a motion of the Attorney General to certify, and the Court doesn't, if the Court has any question as to dismissability of any of the counts, I don't think the Court should, of course, they could be certified.

THE COURT: I take it you feel that if on a 12(b)(6) motion in a constitutional challenge of an act of the General Assembly that the constitutionality of that statute is before the Court on that motion?

MR. KESTER: Absolutely, your Honor. Your Honor, it happens all the time. It just happens all the time.

THE COURT: I'm aware that it happens all the time, but I suppose in the appellate court the Appellate Court is not going to necessarily review the judge's decision on the motion under 12(b)(6). It's going to decide whether the act is, in fact, constitutional or not.

MR. KESTER: The constitutionality of the act, your Honor, I believe is put in issue by the filing of the complaint and the State's motion to dismiss saying that that complaint does not state a cause of action, and that puts it in issue. That makes it certifiable at that point. The issue has been joined on whether that complaint taken on its face shows that there is a constitutional violation. The

Appellate Court looks at it again. It's a pure question of law. It goes up under a pure question of law. And again, I would say this: Many many constitutional cases, as your Honor knows, appear in the books coming up to the Supreme Court, Supreme Court of the United States, in the federal system, and the State's 12(b)(6) is patterned on the federal rule, and it happens all the time under the federal rule as well. It's simply a fairly common method in which constitutional issue is joined. I think it's joined here.

* * *

MR. MARKS: Your Honor, may I be heard very briefly?

THE COURT: Very briefly.

MR. MARKS: Thank you, your Honor. I'd just like for a moment to direct the Court's attention to the 1954 United States Supreme Court decision of Brown vs. Board of Education. Now, in Brown vs. Board of Education, United States Supreme Court overturned about 70 years of well-settled constitutional jurisprudence. Any competent lawyer knew, up until that Monday morning in 1954, that segregated separate public school systems did not offend the constitution. It's as simple as anything. How then do you go about changing the law if there is this insurmountable threshold hurdle that you look at the St. Louis School Department, and you look that they have got one track for black students and another track for white student, and gee, at the threshold this plaintiff cannot

prove beyond a reasonable doubt with no inquiry into the facts how this offends the constitution. So, are we to conclude that the United States Supreme Court with no factual records before it, just read some newspaper articles, magazines, learned journals, and decided to change the law? I don't think that's really how these things work. And I think what the defendants are speaking for here is kind of like the pre Hammurabi Babylonia cult where once the law was written down, it could never be changed. Thank you.

MR. KESTER: May I respond even more briefly, your Honor?

THE COURT: If you keep to even more briefly.

MR. KESTER: I shall. I think that the plaintiffs have really made our point. If Supreme Court precedent is clear and if it's to be overruled, the way that happens is that the case comes up the lower court following the precedent and the Supreme Court can say, if it wants to, "Well, we are going to overrule our prior decision." That's what the plaintiff is really asking for, for a massive overruling of the case up in the Supreme Court. And what this Court's job at this point is, your Honor, is, I think, is to say all right, the constitutional issue has been raised. I will follow the Supreme Court precedents. If the Supreme Court wants to overrule, it's up to them.

MR. MARKS: One sentence please, your Honor? That happens at the end of a trial. That happens at the end

of the trial when there's been a factual record made. The factual record is made, then the Court says, "Yep, I'm going to apply the law be thoroughly decisive." But there aren't any facts here. We're at the pleading stage.

* * *

THE COURT: I'm going to leave my comments on Count 1 until the very last. Quite frankly, I still have some thoughts buzzing around in my head with regard to Count 1, so that I'm going to pick up my comments now starting with Count 2.

As I understand the memoranda submitted by the plaintiffs in the complaints submitted by the plaintiffs, the plaintiffs in Count 2 claim that the legislative enactment operates as a pledge of the credit of the state and is invalid because it has never been approved by a majority of the qualified electorate as required by Article VI Section 16 of the Rhode Island Constitution. The State contends in its presentment to the Court that the argument raised by this claim asserted by the plaintiff has been ruled upon by the Supreme Court. They cite the Supreme Court's attitude contained in an Advisory Opinion, In re Advisory Opinion at 113 RI 580, (1974). The State relies on the language of that case, where the Court found that the capital reserve fund as provided in the General Law 42-64-18(d), "did not operate as a pledge of the credit of this state for payment of obligations to another." That State seems to argue to the Court that this bills language is substantially identical to that which was before the Court in 1974. The plaintiff in responding to that says that this bill adopts an

unprecedented mechanism allowing the state to give a percentage of the project's annual sales tax revenues to the developer. Plaintiff contends that this was done for two reasons. First, the current general assembly recognized it could not pass a bill requiring a certain apportionment by a future general assembly in a future term. And second, the General Assembly did not want to create a present debt by promising a developer a certain amount of money over a term of years. Such an act, plaintiffs contend, would be subject to a statewide referendum that the General Assembly recognized would probably be defeated. The State filed a replyl memo to that argument which the state rejected notions that the bill operates to pledge the credit to the state. Initially, the state focuses on the bill's language which provides that obligations occurred under it, "shall not constitute a debt, liability, or obligation of the state. . . .or a pledge of the faith and credit of the state." The State then, for the benefit of the Court, what it termed to be an "unbroken line" of cases holding that issuance of notes and bonds by public corporations do not pledge the credit of the state and therefore are not prohibited by Article VI, Section 16.

The Court in reviewing the memoranda and the various contentions has concluded that this count does not take a claim upon which relief can be granted, and I do so because the plaintiffs' claim has been addressed by our Supreme Court, that the plaintiffs' claim ignores the plain language of the bill as passed which does provide in part,"obligations issued under the provisions of this chapter. . .shall not constitute a debt, liability or obligation of the state. . .or a pledge of the faith and credit of the

state." Obligations incurred by the Economic Development Council are just that, they are not obligations of the State. The EDC is a public corporation with a legal existence separates and distinct from that of the state. As was true in the case of the Water Resources Board which was the issue before the Court in In re Advisory Opinion, 107 RI 651, (1970). The General Assembly was careful, "to exclude. . .from. . .indebtedness of the state any debt incurred by. . .the Board." Our Supreme Court has repeatedly rejected claims that the issuance of notes and bonds by public corporations constitute a pledge of credit of the state in violation of Article VI, Section 16, to the same event, In re Advisory Opinion involving DEPCO, 593 A.2d 943, Rhode Island case, 1991. Likewise, another In re Advisory Opinion (1970), 107 RI at 655-56. Since this justice in passing upon whether this presents an issue to which plaintiff states a claim upon which I feels he's entitled to relief, the Court rules that this issue has heretofore been adjudicated. It's the same issue that was faced by our Supreme Court, and I dismiss the action for the reasons stated.

* * *

Count 5 is the non-delegable duty. is suppose 5 and 6 are somewhat interrelated. They certainly were interrelated by the parties in their memorandum to the Court, and some of them, some memoranda didn't mention Count 5 and Count 6, non-delegable duty without sufficient guidelines. But, in Count 5, the State complains that the bill constitutes an invalid delegation of non-delegable duty. In my analysis and review of that, The

state didn't really directly respond to that allegation. The plaintiffs did not specifically address the count in their memorandum. Like the State, they seem to focus their attention on allegations which were contained in Count 6, the delegation lacked sufficient guidelines. Treating them separately, it seems to the Court that the delegation, or the powers delegated to the EDC cannot be deemed, "non-delegable," in light of the Court's opinion in, In re Advisory Opinion 113 RI 586 (1974). It was in that case the Court found that the powers delegated to the Port Authority and the Economic Development Corporation were adequately delineated and therefore did not constitute an unlawful delegation of legislative authority. Implicit in that decision is the fact that the powers of the type involved here are delegable. One need only look at both acts to come to the conclusion that we are talking about the same genus; that being, delegated. As a general rule, there are very few powers that are non-delegable. And as one reflects, the power to hear criminal cases can't be delegated, and perhaps the power to consider jury trials could not be delegated to some administrative agency. It seems to the Court these powers which were given to the Economic Development Corporation are not the kind that are classified as non-delegable. The Court will dismiss on Count 5.

Count 6 is the twin brother of Count 5. The plaintiff alleges that if we assume the powers are delegable, that that delegation by the General Assembly lacks adequate guidelines and standards. The Court specifically reviewed both the State and the plaintiffs' memorandum. I spent more time—State consumed four

pages in outlining its position as it relates to the delegation and powers argument. The Plaintiff's was a bit more wordy, taking six pages, and when the State filed its reply, they set out in some, 18 to 27, some additional nine pages in discussing this particular issue. I'm not going to put on the record an analysis of what your arguments were, but I think that when you treat it, Count 6, that they were addressing in Count 5 as well, and most of your comments related to both Count 5 and Count 6. The Court feels that as with Count 5, the Court's guided by the opinion In re Advisory Opinion at 113 RI at 586, the plaintiff has made a bold allegation that the EDC has "unbridled discretion" that are conclusions urged upon the Court, ignores the very language of the delegation, and is contained by way of limitation in the legislative enactment. Plaintiff's claim seems to claim that the delegation must be viewed in light of a "relaxed" non-delegation doctrine under which the Supreme Court has recognized a need, "to enable the Legislature to carry out its responsibilities through administrative bodies." The Court finds some authority for its actions in Town of East Greenwich vs. O'Neil, a 1992 case cited at 617 A.2d 104. The Legislature has used administrative delegation of some of its powers so that the Legislature may have assistance in carrying out its functions and responsibilities. The Court must examine the legislation to find the specifics, the specificity of the functions delegated, the standards accompanying the delegation, and the safeguards against administrative abuse. In looking at this legislation, the bill grants the EDC the ability to determine whether lessees should be exempt from taxation "to the same extent as if legal title of such property were in the name of the corporation."

It seems to the Court this is a very narrow function. You cannot ignore that it is narrow, but that narrow delegation does not violate the first prong of my analysis. That is, a look at this specificity of the functions delegated. Secondly, the standards accompanying the delegation provides sufficient guidelines to govern its usage. The EDC may grant a tax exemption only when, "the project is a project of the corporation under General Laws 42-35-3(p), and it is in the interest of the corporation and the project that legal title be held by the lessee from the corporation." In determining, "the interest of the corporation," the EDC is bound by the purposes set forth in its enabling statute. General Laws 42-64-5. There was a case of J.M. Mills vs. Murphy, 115 RI 54, a 1976 case. In that case the Court indicated, "the statements of purpose and policy contained in that Act adequately limited the discretion of the director."

Concerning the final analysis; that is, what safeguards are involved, the fact that the actions of the Economic Development Counsel are subject to the same contained in the Administrative Procedures Act, General Laws 42-35-1, which also includes availability of judicial review, the Court's judgment guards against any arbitrary capricious act of the agency in carrying out the functions delegated to it. The Court will likewise dismiss the argument in Count 6 which many relates to the language standards.

I will say here and now and for at least one trial judge's opinion of the Supreme Court, I believe the Supreme Court stated the proper standard to be applied by

the trial bench when it decided Sweeney. I'm not overly impresed by the fact that other cases have been certified to the Supreme Court involving declaratory judgment actions. It seems that since deciding Sweeney, indicating to the trial court the trial court should impose upon the generosity of the attorneys appearing before them and do its own research and to resolve the issues confronting the trial court before considering whether the justice is in doubt as to the constitutionality of the statute for him, this justice has tried, with the assistance of my able law clerk's research ability to address the issues presented to me on the motion to dismiss. I'm indebted to counsel appearing ad hac vice before me for the expressions that helped me re-focus the Court's obligation. It seems to the Court if there were factual issues in the complaint, that perhaps the hurdle on a 12(b)(6) motion would not necessarily bring the constitutionality of the statute before the Court. The 12(b)(6) motion applies to all kinds of litigation. Complaints may very well be addressed under a 12(b)(6) motion where there are certain facts alleged as a basis for the relief sought. The caveat, therefore, that the Court must consider is whether there is any basis of any set of facts which would entitle the plaintiff to relief. The Court is admonished it should not dismiss the compliant. Seems to this justice that that is a valid test except in the area we are asking by way of declaratory judgment to consider the constitutionality of the statute. Both parties in their memoranda and in their argument as to Count 1 and Count 2 have conceded that no election has taken place in Providence nor is by the legislation required to take place in Providence, or no statewide election under Count 2 is contemplated nor has it taken place. Seems to the Court that the issue, the constitutionality of the act of the General

Assembly is therefore likewise in Count 1 specifically before the Court on the Motion to Dismiss. Again, I had you spread your thoughts upon the record as it relates to that is before me on Count 1. Your memos are, quite honestly, most exhaustive in the authorities in which you rely upon.

I've had time to think about and consider the comments made by the plaintiffs in particular as it relates to their contention that they are aggrieved, particularly the individual plaintiff who is alleged to be a resident of Providence. This statute does enjoy at this particular time the presumption of its constitutionality. The person who attacks that statute has a heavy burden, whether that burden be discharged in the Superior Court, or whether it be discharged in the Appellate Court. Well, none of us who sit on issues such as this are infallible. And Count 1 presents, in the Court's judgment, an issue which should be resolved at this particular time. Seems to the Court that in order for the plaintiff to be deemed to have stated a valid claim in Count 1, which claim is a violation of Article XIII Section 4 of the Rhode Island Constitution, the bill must not be one of, "statewide concern," quoting Marro vs. General Treasurer 108 RI 192. In that case the Supreme Court said, "the power of the General Assembly remains exclusive and undiminished as to matters of statewide concern." Where the legislation at issue, "affects only a single community," it is a matter of local concern and must be approved by the voters of that community. Citing McCarthy vs. Johnson, 574 A.2d 1229, 1990 Supreme Court opinion. In contrast, where it appears that uniform regulations throughout the state is necessary or desirable,

where the particular matter is traditionally within the historical dominion of one entity or where the legislation has a significant effect upon people outside of the home rule town or city, the legislation is apt to be deemed a matter of statewide concern. The language comes from East Greenwich vs. O'Neil 617 A.2d 104. In passing this bill, the Legislature made a series of findings concerning the bill's statewide impact. Specifically, the Legislature found that the project would help alleviate chronic unemployment and underemployment, would assist the state in achieving its clean air quality goals, would increase state tax revenues, and would provide statewide economic benefits by recapturing a significant amount of out-of-state purchasing currently made by Rhode Island residents.

Now, there is no question as stated by plaintiffs' counsel that many of the so-called findings of fact might be classified by the plaintiffs as rosy predictions of the future, but in the Court's judgment, those findings of fact, while not facts presently in existence, do comport with the Court's conclusion that this bill has statewide impact and statewide interest. I think that to come to a different conclusion would be like the ostrich who buries its head in the sand. Our Supreme Court has noted that while the General Assembly is not required to make findings in order to pass legislation, that when it does make such findings, they are entitled to great deference by the judiciary. The Supreme Court did not say they were entitled to great deference period. They went on in the Advisory Opinion in DEPCO to say that they were entitled

to great deference by the judiciary which prompted the question that I asked at the beginning of the afternoon.

There was a second argument advanced by the State as it relates to language in the case on taxation. The defendant quotes, the plaintiff quotes, I believe the case is, one of the parties was Nolan, for the support that where a public body is clothed by statute with power to do an act which public interest requires to be done, the execution of the power may be insisted on as a duty, though the statute conferring the power only appears to be permissive in terms. In such circumstances the construction of the word "may' and "shall" is well established. I did look at the legislation, and while there are other cases which are replete in other context, indicating when the Court would construe the word "may" which by it's definition is permissive to be interpreted as "shall," there is no such mandate contained in the legislation to which the Court finds any relevance to the Nolan citation.

In the last analysis one has to ask one's self, does the physical presence of the Providence Place project within the confines of Providence equate the project as a local concern? The plaintiff says that the State in providing for a method of financing in this project and for allowing continued negotiations between the city and the project developer, and by not having finalized some of the agreements, and that by granting authority to the city of Providence in the tax field, that therefore, some election or referendum addressed to the city of Providence voters is required. Under the trust of his complaint in Count 1, the mere fact of the unusual nature of this legislation and the

novelty provided by the General Assembly in order to have government and private money create the Providence Place project, does not in and of itself raise the mantle of unconstitutionality. I have found nothing in the arguments of counsel nor the reading of the statute enacted by the General Assembly, nor the scheme adopted by the General Assembly for a statewide project that violates the Home Rule Charter of the city of Providence. Consequently, the Court will dismiss Count 1 of this complaint.

It would seem to the Court now that having dismissed all of the complaints, I dismissed three counts which I felt at the time I dismissed them were so clearly self-evident that I wanted to dispose of them immediately, but I have effectively dismissed the entire complaint of these claims. The plaintiffs exception to the Court's ruling is noted. Counsel representing the defendants will prepare and submit an order memorializing the Court's ruling.

* * *

42-63.2-3. Property Taxes. Notwithstanding the provisions of any other general or special law to the contrary, the EDC and the City are hereby authorized to enter into and execute a tax treaty agreement with the developer with respect to all real and personal property taxes or payments in lieu of such taxes which related to the Providence Place Project, including, without limitation, the real property which constitutes the Project Site, including the real and personal property of owners, tenants and occupants thereof, as well as provisions dealing with the revitalization of the downtown district of the City and the development of the Capital Center District of the City and such other matters and terms, without limitation, as both the EDC and the City shall deem advisable. The tax treaty agreement shall provide, among other things, for (i) the stated term set forth in paragraph (ii) below, (ii) fixing the amount of tax payments or payments in lieu thereof due for each year of the term as set forth in the following Schedule A:

SCHEDULE A

TAXES ASSESSED DECEMBER 31	FOR FISCAL YEAR	BASE ANNUAL PAYMENT IN LIEU OF TAX
1993	July 1, 1994-June 30, 1995	$ -0-
1994	July 1, 1995-June 30, 1996	$ -0-
1995	July 1, 1996-June 30, 1997	$ -0-
1996	July 1, 1997-June 30, 1998	$ -0-
1997	July 1, 1998-June 30, 1999	$3,500,000.00
1998	July 1, 1999-June 30, 2000	$3,500,000.00
1999	July 1, 2000-June 30, 2001	$3,500,000.00
2000	July 1, 2001-June 30, 2002	$3,500,000.00
2001	July 1, 2002-June 30, 2003	$3,500,000.00
2002	July 1, 2003-June 30, 2004	$4,700,000.00
2003	July 1, 2004-June 30, 2005	$4,700,000.00
2004	July 1, 2005-June 30, 2006	$4,700,000.00

2005	July 1, 2006-June 30, 2007	$4,700,000.00
2006	July 1, 2007-June 30, 2008	$4,700,000.00
2007	July 1, 2008-June 30, 2009	$4,700,000.00
2008	July 1, 2009-June 30, 2010	$4,700,000.00
2009	July 1, 2010-June 30, 2011	$4,700,000.00
2010	July 1, 2011-June 30, 2012	$4,700,000.00
2011	July 1, 2012-June 30, 2013	$4,700,000.00
2012	July 1, 2013-June 30, 2014	$4,700,000.00
2013	July 1, 2014-June 30, 2015	$4,700,000.00
2014	July 1, 2015-June 30, 2016	$4,700,000.00
2015	July 1, 2016-June 30, 2017	$4,700,000.00
2016	July 1, 2017-June 30, 2018	$4,700,000.00
2017**	July 1, 2018-June 30, 2019	$4,700,000.00
2018**	July 1, 2019-June 30, 2020	$4,700,000.00
2019**	July 1, 2020-June 30, 2021	$4,700,000.00
2020**	July 1, 2021-June 30, 2022	$4,700,000.00
2021**	July 1, 2022-June 30, 2023	$4,700,000.00
2022**	July 1, 2023-June 30, 2024	$5,900,000.00
2023**	July 1, 2024-June 30, 2025	$5,900,000.00
2024**	July 1, 2025-June 30, 2026	$5,900,000.00
2025**	July 1, 2026-June 30, 2027	$5,900,000.00
2026**	July 1, 2027-June 30, 2028	$5,900,000.00
	Total	$141,000,000.00

**to be adjusted by the CPI over the prior year

and (iii) dedicating one hundred percent (100%) of such payments during the first twenty years in which such payments are required, and ninety percent (90%) during the next ten years in which such payments are required to the amortization of costs incurred to finance or refinance the construction and development of the Providence Place Garage on which the City will hold an option to acquire a one-half (½) interest for nominal consideration upon substantially the same terms as the State's option described in Section 5, such payments (together with liens related thereto and the rights to enforce such liens) to be made or assigned directly to the lender or lenders or trustees for such lenders (as designated from time to time by the developer) which are providing the original or subsequent

financing or refinancing of the Providence Place Garage (which may be separate or combined with the financing for the Mall portion of the Providence Place Project), for such period during the terms of the agreement that the then outstanding amount of principal, interest or other charges remaining due under such financing or refinancing is equal to or greater than the last amount of such payments, and (iv) dedicating ten percent (10%) of such payment during the ten (10) years in which such payments are made to the city of Providence.

The tax treaty agreement described herein is subject to approval of the city council of the city of Providence.

SECTION 2. General Assembly Approval. The approval of this Act by the General Assembly constitutes full compliance with the provisions of Chapter 18 of Title 35 of the General Laws.

42-63.2-4. Additional Provisions of Public Investment and HOV Agreement and Ground Lease. Notwithstanding the provisions of any other general or special law, and subject to the approval of and upon terms acceptable to the EDC, the Public Investment and HOV Agreement and the Ground Lease shall provide for, among other things, (i) payment to the developer of an annual sum payable in monthly installments, for a period of twenty (20) years, such sum to be calculated in accordance with the following sentence and evidenced by an economic development note of the EDC having a term not exceeding twenty (20) years to be secured by a capital reserve fund under Section 42-64-18(d) of the General Laws, and (ii) an option for the State to acquire a one-half (½) interest in the Garage for nominal consideration to be exercised at any time during the last year of the initial ninety-nine (99) year

term of the Ground Lease. The annual payment due under the Public Investment and HOV Agreement and the economic development note executed in connection therewith, in addition to parking revenue from the HOV spaces in the Garage, during the initial five (5) year period shall be equal to the lesser of (i) Three Million Six Hundred Eighty Thousand Dollars ($3,680,000) or (ii) two-thirds (2/3) of the actual amount of sales tax generated from retail sale transactions occurring at or within the Mall during such year reduced by any payments required to be made to the Rhode Island Depositors Economic Protection Corporation Special Revenue Fund ("DEPCO") pursuant to Section 44-19-40 of the General Laws, as it may be amended, which currently require that six tenths of one percent (0.6%) of all sales tax revenues received by the State be devoted to payments to DEPCO. The annual payment due during the second fifteen (15) year period shall be equal to the lesser of (i) Three Million Five Hundred Sixty Thousand Dollars ($3,560,000) or (ii) two-thirds (2/3) of the actual amount of sales tax generated from retail sales transactions occurring at or within the Mall during the year reduced by payments required to be made to DEPCO. In the event the annual payment due in one or more years is less than the maximum applicable amount set forth above, and if the actual sales tax revenues derived from the mall in any subsequent year as so adjusted for the required DEPCO payments referred to above exceeds the maximum payment amount specified for the applicable years set forth above, then the annual payment due for each such subsequent year during such initial twenty (20) year period shall be equal to such maximum amount applicable for the year plus one-half (½) of the amount by which sales tax revenues derived from the Mall in each such subsequent year during such initial twenty (20) year period as so adjusted for the required

DEPCO payments referred to above exceed such maximum amounts until the aggregate amount of all underpayments below such maximum amounts for all preceding years has been paid to the developer. No payment under either the Public Investment and HOV Agreement or the economic development note, shall be due after the expiration of the initial twenty (20) year period. Notwithstanding the provisions of any other general or special law, including, without limitation, Section 42-64-11, the Ground Lease shall be for an initial term of ninety-nine (99) years, with four (4) successive options to extend for additional terms of ninety-nine (99) years each, subject to the conditions set forth in the Ground Lease. Subject to annual appropriation by the General Assembly, the State shall pay to the EDC an amount equal to the annual payment which the EDC is required to make to the developer pursuant to the Public Investment and HOV Agreement or economic development note described herein.

Notwithstanding the provisions of any other general or special law to the contrary, including without limitation the provisions of Section 42-64-18(e) of the General Laws, the EDC shall have no obligation to repay to the State any amounts paid to the developer under the Public Investment and HOV Agreement or the economic development note.

. . . .

42-64-20. Exemption from taxation.— (a) The exercise of the powers granted by this chapter will be in all respects for the benefit of the people of this state, the increase of their commerce, welfare, and prosperity and for the improvement of their health and living conditions and will constitute the performance of an essential

governmental function and the corporation shall not be required to pay any taxes or assessments upon or in respect of any project or of any property or moneys of the corporation, levied by any municipality or political subdivision of the state, provided, that the corporation shall make payments in lieu of real property taxes and assessments to municipalities and political subdivisions with respect to projects of the corporation located in the municipalities and political subdivisions during such times as the corporation derives revenue from the lease or operation of the projects. Such payments in lieu of taxes shall be in such amounts as shall be agreed upon by the corporation and the affected municipalities and political subdivisions. Failing the agreement, the amounts of payments in lieu of taxes shall be determined by the corporation using a formula that shall reasonably ensure that the amounts approximate the average amount of real property taxes due throughout the state with respect to facilities of a similar nature and size. Any municipality or political subdivision is hereby empowered to accept at its option an amount of payments in lieu of taxes less than that determined by the corporation. If, pursuant to section 42-64-13(f), the corporation shall have agreed with a municipality or political subdivision that it shall not provide all of the services therein specified, the payments in lieu of taxes shall be reduced by the cost incurred by the corporation or any other person in providing the services not provided by the municipality or political subdivision.

(b) The corporation shall not be required to pay state taxes of any kind, and the corporation, its projects, property, and moneys and, except for estate, inheritance, and gift taxes, any bonds or notes issued under the provisions of this chapter and the income (including gain from sale or exchange) therefrom shall at all times be free

from taxation of every kind by the state and by the municipalities and all political subdivisions of the state. The corporation shall not be required to pay any transfer tax of any kind on account of instruments recorded by it or on its behalf.

(c) For purposes of the exemption from taxes and assessments upon or in respect of any project under subsections (a) or (b) of this section, the corporation shall not be required to hold legal title to any real or personal property, including any fixtures, furnishings or equipment which are acquired and used in the construction and development of such project, but such legal title may be held in the name of a lessee (including sublessees) from the corporation. Such property, which shall not include any goods or inventory used in such project after completion of construction shall be exempt from taxation to the same extent as if legal title of such property were in the name of the corporation, provided that the board of directors of the corporation adopts a resolution confirming use of such tax exemption for such project by such lessee. Such resolution shall include findings that (1) the project is a project of the corporation under R.I. Gen. Laws 42-64-3(p) and (2) it is in the interest of the corporation and of the project that legal title be held by the lessee from the corporation. In adopting any such resolution, the board of directors may consider any factors it deems relevant to the interests of the corporation or the project including, for example, but without limitation, reduction in potential liability or cost to the corporation or designation of the project as a "Project of Critical Economic Concern" pursuant to Chapter 117 of Title 42 of the General Laws.

Supreme Court, U.S.
FILED
JAN 17 1997
CLERK

No. 96-1100

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

WARWICK MALL TRUST, *et al.*,
Petitioners,
v.
STATE OF RHODE ISLAND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Rhode Island

BRIEF IN OPPOSITION

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19pp

QUESTIONS PRESENTED

1. May a petition for certiorari be filed to review a state final judgment entered more than 90 days earlier?

2. May this Court review on certiorari a federal claim not raised in the state court below?

3. Did the Rhode Island courts violate the First and Fourteenth Amendments when, in dismissing a complaint for failure to state a claim upon which relief could be granted, they observed that state statutes are presumed constitutional unless shown otherwise beyond a reasonable doubt?

LIST OF PARTIES

Appellants in the Supreme Court of Rhode Island, petitioners here, were Warwick Mall Trust, Bliss Properties, Inc., and Irving Schwartz. Appellees in that court, respondents here, are the State of Rhode Island, Governor Lincoln C. Almond, and Providence Place Group Limited Partnership.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1100

WARWICK MALL TRUST, *et al.*,
Petitioners,

v.

STATE OF RHODE ISLAND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Rhode Island

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BRIEF IN OPPOSITION

JURISDICTION

As is discussed below, this Court lacks jurisdiction because the petition for certiorari was not filed within the time prescribed by 28 U.S.C. § 2101(c), and the federal right asserted was not claimed or denied in the court below as required by 28 U.S.C. § 1257(a).

STATEMENT

Petitioners, the owners and operators of a shopping mall in Warwick, Rhode Island, sued in Rhode Island Superior Court seeking a declaration that a Rhode Island statute, which authorized various tax and other incentives to a new shopping mall as part of the redevelopment of downtown Providence, violated the Rhode Island and United States Constitutions.[1] The Superior Court dis-

[1] The complaint alleged, in addition to many state-law claims, that the statute denied due process of law and equal protection of

missed the complaint under Rhode Island Superior Court Rule 12(b)(6) for failure to state a claim upon which relief could be granted, observing that state statutes in Rhode Island enjoy a presumption of constitutionality unless shown otherwise beyond a reasonable doubt.

On appeal to the Supreme Court of Rhode Island, petitioners in a 95-page brief made no claims of violation of any federal law or constitutional provision. They did argue that Rhode Island's well-established presumption that state statutes are constitutional unless shown otherwise beyond a reasonable doubt [2] somehow conflicted with this Court's decision in *44 Liquormart, Inc.* v. *Rhode Island*, 116 S. Ct. 1495 (1996). Opening Brief for Plaintiffs-Appellants, No. 96-162, Sup. Ct. of R.I., at 91-93, pp. 4a-5a, *infra*.[3]

Respondents asked the Supreme Court to expedite its decision because "[t]he pendency of this appeal is impeding the completion of the financing necessary for the Providence Place Mall development." Memorandum of Appellees, Supreme Court of Rhode Island, filed June 4, 1996, at 3. The Supreme Court did so. It heard argu-

---

the laws under the Fourteenth Amendment, and that delegation of state legislative powers to a state agency violated unspecified provisions of the United States Constitution. None of those federal arguments was repeated in the Supreme Court of Rhode Island.

[2] "[L]egislative enactments of the General Assembly are presumed to be valid and constitutional . . . and the party challenging the constitutional validity of the statute carries the burden of persuading the court beyond a reasonable doubt that the legislation violates an identifiable aspect of the constitution."

Dowd v. *Rayner*, 655 A.2d 679, 681 (R.I. 1995); see also, *e.g.*, *Chartier Real Estate Co.* v. *Chafee*, 101 R.I. 544, 225 A.2d 766 (1967).

[3] Reproduced in the addendum are the Questions Presented in petitioners' brief in the Supreme Court of Rhode Island, and the portion of their argument that challenged the presumption of constitutionality. In their petition they no longer rely on *44 Liquormart*.

ment on July 19, 1996, and the same day entered an order affirming the dismissal; its order stated that the judgment "is hereby affirmed," and added that "[a]n opinion setting forth the reasons for this order will follow." Pet. Cert. App. A-1.[4] On October 11, 1996, an opinion was issued in which the court explained the reasons for the affirmance it had entered in July. Pet. Cert. App. A-4.

REASONS FOR DENYING THE WRIT

I. THIS COURT LACKS JURISDICTION BECAUSE THE PETITION FOR CERTIORARI WAS FILED OUT OF TIME.

This Court lacks jurisdiction because the petition for certiorari was filed after expiration of the ninety days prescribed by 28 U.S.C. § 2101(c) and this Court's Rule 13.1.[5] The Supreme Court of Rhode Island on July 19, 1996 entered its decision affirming the judgment dismissing petitioners' complaint. Pet. Cert. App. A-1. The petition for certiorari was not filed until January 9, 1997, 174 days later. The time requirement of § 2101(c) is jurisdictional. *Missouri* v. *Jenkins*, 495 U.S. 33, 45 (1990). "A petition for certiorari in a civil case must be filed within 90 days of the entry of the judgment below."

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[4] On July 22, 1996, the next business day after losing in the Supreme Court, two of the petitioners filed yet another lawsuit seeking to block enforcement of agreements implementing the legislation for the new mall. The Supreme Court of Rhode Island expedited that case also, and rejected petitioners' claims in an order entered September 12, 1996. *Sasso* v. *State*, No. 96-416, Sup. Ct. of R.I.

[5] Title 28 U.S.C. § 2101(c) provides:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

FEC v. *NRA Political Victory Fund*, 115 S. Ct. 537, 539 (1994).

The petition was filed instead on the ninetieth day after the subsequent explanatory opinion issued. But this Court's "power is to correct wrong judgments, not to revise opinions." *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945); *accord*, *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956). Under 28 U.S.C. § 1257(a), it is "[*f*]*inal judgments or decrees* rendered by the highest court of a State in which a decision could be had" that this Court reviews on certiorari. (Emphasis supplied.)[6] Under § 2101 (c), such review must be sought within ninety days. "When the case is decided, the time to seek our review begins to run." *Market Street Ry.* v. *Railroad Comm'n*, 324 U.S. 548, 552 (1945); see also *Department of Banking* v. *Pink*, 317 U.S. 264, 268 (1942).[7] Here the "[f]inal judgment[] or decree[]" was entered July 19, 1996. No rehearing was sought or granted. The petition is out of time.

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[6] Title 28 U.S.C. § 1257(a) provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

[7] "[T]he test is . . . whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court . . . . Where the order or judgment is final in this sense, the time for applying to this Court runs from the date of the appellate court's order." 317 U.S. at 268. Similarly in federal practice, "[w]here, as here, a formal judgment is signed by the judge, this is *prima facie* the decision or judgment rather than a statement in an opinion or a docket entry." *United States* v. *Hark*, 320 U.S. 531, 534-35 (1944) (footnote omitted).

II. THE FEDERAL QUESTION WAS NOT RAISED BELOW.

Petitioners argue that, by stating that statutes are presumed constitutional unless shown to be otherwise beyond a reasonable doubt, Rhode Island's courts have violated the First and Fourteenth Amendments to the Constitution of the United States. Pet. Cert. 16, 22. But petitioners did not make any claim in the courts below that the presumption of constitutionality violated those provisions. They asserted in their brief to the Supreme Court of Rhode Island that Rhode Island's long-established presumption of constitutionality somehow conflicted with the standard for motions to dismiss in Rhode Island Superior Court Rule of Civil Procedure 12(b)(6), and in some unspecified manner with this Court's decision in *44 Liquormart, supra.* See pp. 3a-5a, *infra.* Nowhere did they claim a violation of the First or Fourteenth Amendments. Nor did the Rhode Island Supreme Court—which rejected petitioners' objection to the presumption of constitutionality in a single sentence—refer to any federal law or authority. See Pet. Cert. App. A-21 - A-22. Under 28 U.S.C. § 1257(a), the defect is jurisdictional. Moreover, even in federal cases "It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Youakim* v. *Miller,* 425 U.S. 231, 234 (1976), quoting *Duignan* v. *United States,* 274 U.S. 195, 200 (1927); see also, *e.g., Delta Air Lines, Inc.* v. *August,* 450 U.S. 346, 362 (1981).

III. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

Petitioners' constitutional claim is insubstantial. They object to having their complaint dismissed for failure to state a cause of action, and assert that somehow they were denied due process because Rhode Island describes its legal presumption of constitutionality as one beyond

a reasonable doubt. They do not show that as a practical matter that formulation amounts to anything different from the presumption of constitutionality this Court and nearly all others traditionally apply. *E.g., Concrete Pipe & Prods. of California, Inc.* v. *Construction Laborers Pension Trust,* 508 U.S. 602, 637 (1993).

In any event, that judicial deference to legislative judgment played no crucial role in the outcome here. As the Supreme Court of Rhode Island pointed out, "Here, there were no material facts in dispute that were outcome determinative." Pet. Cert. App. A-21. The decision upholding the state statute was purely one of state law. Petitioners did not proffer to the Rhode Island courts any facts that would alter that legal outcome, nor do they do so here.

Petitioners argue they were denied due process, citing cases holding that litigants may not be denied access to the courts and a fair opportunity to present their evidence. *E.g., Richards* v. *Jefferson County,* 116 S. Ct. 1761 (1996); *Wolff* v. *McDonnell,* 418 U.S. 539, 579 (1974). But petitioners enjoyed full due process rights here. Their case failed on legal grounds; there was no material evidence to present. Petitioners assert that their argument "cannot be avoided on the basis of the claim that there were no factual questions raised by their pleadings." Pet. Cert. 20. But that is incorrect. Litigants are thrown out of court every day for failure to state a claim. *Cf.* Rule 12(b)(6), Fed. R. Civ. P. Familiar pleading rules treat factual allegations as true, but not legal ones. See *Conley* v. *Gibson,* 355 U.S. 41, 45-46 (1957). Due process may guarantee some right to file a complaint, but not a right to have a court hold it legally sufficient.

With or without a presumption of constitutionality—which is a legal, not an evidentiary, presumption—petitioners failed as a matter of law to allege any legally sufficient reason to hold the Rhode Island statute invalid. To enter judgment against a party who has failed as a

matter of law to state a claim violates no constitutional provision.

CONCLUSION

For the reasons stated, the petition should be dismissed or certiorari should be denied.

Respectfully submitted,

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January 17, 1997

ADDENDUM

ADDENDUM

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

SUPREME COURT

No. 96-162 APPEAL

WARWICK MALL TRUST, BLISS PROPERTIES, INC.,
and IRVING SCHWARTZ,

Appellants,

v.

THE STATE OF RHODE ISLAND, THE HONORABLE LINCOLN C. ALMOND, in his capacities as Governor of the State of Rhode Island and Chairman of the Rhode Island Economic Development Corporation, and Providence Place Group,

Appellees.

On appeal from the
Superior Court for Providence County,
Case No. PC 95-4960

OPENING BRIEF FOR PLAINTIFFS-APPELLANTS
WARWICK MALL TRUST,
BLISS PROPERTIES, INC., AND IRVING SCHWARTZ

* * * *

[8] QUESTIONS PRESENTED

1. Whether P.L. 95-400's provisions regarding the City of Providence's tax treaty are valid, despite that statute's lack of approval by the voters of Providence in the referendum required by R.I. Const. Article XIII, § 4?

2. Whether P.L. 95-400's provisions requiring future payments of sales tax revenues to the Providence Place Mall's developers' lenders are valid, despite P.L. 95-400's lack of approval by the voters of Rhode Island in the referendum required by R.I. Const. Article VI, § 16, in view of plaintiffs' proffered evidence that Governor Almond told the Board of the Economic Development Corporation that a failure by a future General Assembly to appropriate such funds would ruin the State's credit rating?

3. Whether P.L. 95-400's provisions vesting tax-exempting power in unelected political appointees are repugnant to the separation of powers doctrine?

4. Whether the challenged statute's predictive legislative "findings," the majority of which do not pertain to currently-existing factual circumstances, are entitled to great deference by the judiciary amounting to preclusive and conclusive effect?

[9] 5. Whether a party challenging the Constitutionality of a statute has the burden, at the pleading stage, to establish the un-Constitutionality of the challenged statute "beyond a reasonable doubt," which is a standard significantly more rigorous than the usual Rule 12(b)(6) standard?

* * * *

[90]

V. THE SUPERIOR COURT ERRED IN GRANTING DEFENDANTS' RULE 12(b)(6) MOTION AND BY HOLDING THAT PLAINTIFFS HAD THE BURDEN, AT THE PLEADING STAGE, TO ESTABLISH THE UNCONSTITUTIONALITY OF THE CHALLENGED STATUTE "BEYOND A REASONABLE DOUBT," WHICH IS A STANDARD SIGNIFICANTLY MORE RIGOROUS THAN THE USUAL RULE 12(b)(6) STANDARD.

The trial court erred in failing to apply the usual Rule 12(b)(6) standard. The legal standard to be applied in passing upon a motion to dismiss is whether plaintiff would have a legal right to relief under any set of facts that fit within the compass of the complaint, and in this regard the well-pled allegations of the complaint must be accepted as true. *Warth v. Seldin,* 422 U.S. 490, 501 (1975). Furthermore, the court must draw all reasonable inferences in favor of the non-movant. *Allen v. West Point-Pepperell, Inc.,* 945 F.2d 40, 44 (2d Cir. 1991). A motion to dismiss can be granted only when it appears *beyond doubt* from an examination of the complaint that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957).

The trial court stood this standard on its head. The trial court erroneously imposed a "beyond a reasonable doubt" standard upon *plaintiffs.* In doing so, the Superior Court alluded to language form [*sic*] the Rhode Island Supreme Court's opinion in *Chartier Realty Company, Inc.* v. Chaffee [*sic*], 101 R.I. 544 (1967), which the Superior Court took to suggest that the legal standard to be [91] applied in this case was whether plaintiffs' complaint standing alone, had established the un-Constitutionality of the challenged statute "beyond a reasonable doubt." [App. Tab 4, pp. 12-18]. The "beyond a reasonable doubt" standard applies to factual matters, and usually

in a criminal case. A motion to dismiss tests only the legal sufficiency of a complaint, and cannot establish contested facts. In dismissing plaintiffs' claims involving the referendum-on-debt requirement and the non-delegation doctrine, the Superior Court essentially resolved all possible factual disputes against plaintiffs and in favor of the challenged legislation.

The Superior Court's ruling erects a barrier that few if any complaints challenging legislative enactments could ever overcome, especially when plaintiff's theory is that a facially-neutral statute is discriminatory in effect or as applied.

A perfect example of why the Superior Court's allocation of burdens is unworkable and inequitable is found in the Rhode Island liquor-price advertising ban case, *44 Liquormart, Inc. v. Rhode Island*, 1996 WL 241709 (May 13, 1996):

> The parties stipulated that the price advertising ban is vigorously enforced, that Rhode Island permits "all advertising of alcoholic beverages excepting references to price outside the licensed premises," and that petitioners' proposed ads do not concern an
> [92] illegal activity and presumably would not be false or misleading. *44 Liquor Mart, Inc. v. Racine*, 829 F.Supp. 543, 545 (D.R.I. 1993). *The parties disagreed, however, about the impact of the ban on promotion of temperance in Rhode Island. On that question the District Court heard conflicting expert testimony and reviewed a number of studies.*

44 Liquormart, Inc. v. Rhode Island, 1996 WL 241709, *5. The United States Supreme Court's opinion makes clear that fact-finding, not the use of blunderbuss presumptions, is required:

> However, without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will sig-

nificantly advance the State's interest in promoting temperance.

Id., 1996 WL 241709, *12. This is a classic question of fact that cannot be resolved by reading the pleadings. There is an exact parallel here to appellants' claim regarding the obligation EDC will undertake to the Providence Place Mall's lenders being a State debt. However, the Superior Court disregarded plaintiffs' proffered evidence, and decided the case on an improper presumption.

If the Superior Court's application of the law is correct in this case, the United States Supreme Court's application of the law in *44 Liquormart* was error. Applying the Superior Court's reasoning to the *44 Liquormart* case results in a decision that plaintiffs there had failed at the pleading stage to demonstrate beyond a reasonable doubt that Rhode Island's price advertising [93] ban was un-Constitutional, because their case depended on disputed facts that must be resolved in favor of the challenged enactment.

If it is upheld, the Superior Court's application of *Chartier* will have an immediate chilling effect across a broad spectrum of rights.

* * * *

FILED
JAN 24 1997
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No. 96-1100

In The

Supreme Court of the United States

October Term, 1996

WARWICK MALL TRUST, et al.,

Petitioners,

v.

STATE OF RHODE ISLAND, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Rhode Island

BRIEF OF RESPONDENT STATE OF RHODE ISLAND IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to review a federal claim which was never raised in the state court below.

2. Whether this Court has jurisdiction to review a petition for certiorari filed more than 90 days after the Rhode Island Supreme Court's entry and docketing of a judgment or decree.

3. Whether a State court's requiring a plaintiff to prove the unconstitutionality of the State statute "beyond a reasonable doubt" constitutes a violation of a due process right to access to the courts.

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JURISDICTION

The Supreme Court of the United States lacks jurisdiction over the instant petition because: 1) petitioners failed to raise a federal question in the State court and cannot do so for the first time in a petition for writ of certiorari; 2) the petition for writ of certiorari was not timely filed; and 3) there is no federal claim presented by the State Court's application of a "beyond reasonable doubt" standard of proof to a party challenging the constitutionality of a state statute.

STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C. § 1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Title 28 U.S.C. § 2101(c) requires:

> Any . . . writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days

after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

STATEMENT OF THE CASE

Plaintiff-petitioners' eight count complaint requested that the Rhode Island Superior Court for Providence County declare unconstitutional certain portions of Rhode Island Public Law 95-400. Defendants moved to dismiss the complaint pursuant to Rule 12(b)(6) of the Rhode Island Rules of Civil Procedure. After considering extensive briefs and oral argument, the Superior Court determined that the plaintiffs had not sustained their burden of proving "beyond a reasonable doubt" that R.I. Pub. Law 95-400 was unconstitutional. The Superior Court therefore dismissed the complaint in its entirety.

Petitioners appealed to the Rhode Island Supreme Court, challenging the dismissal of only three of their claims. While petitioners vaguely asserted below that one portion of the challenged statute violated both a state and federal right, petitioners have not sought certiorari on this issue. None of the remaining arguments petitioners made to the Rhode Island Superior or Supreme Court addressed federal constitutional issues, rights or privileges.

On July 19, 1996, the Rhode Island Supreme Court issued an Order affirming the Superior Court's dismissal of the plaintiffs' complaint pursuant to Rule 12(b)(6). Pet.

Cert. App., p. A-1. That Order indicated that "An opinion setting forth the reasons for this order will follow." On October 11, 1996, the Rhode Island Supreme Court issued its opinion. Pet. Cert. App., p. A-4.

REASONS FOR DENYING THE WRIT

PETITIONERS HAVE FAILED TO MEET THE JURISDICTIONAL REQUIREMENTS FOR THIS COURT'S ACCEPTANCE OF A PETITION FOR WRIT OF CERTIORARI

Jurisdiction to review judgments or decrees rendered by the highest court of a state is vested in this Honorable Court pursuant to 28 U.S.C. § 1257. That law permits review by writ of certiorari: 1) where the validity of a statute or treaty of the United States is drawn into question; 2) where the validity of a State statute is challenged as violative of the United States constitution; or 3) where a right, privilege or immunity is specially set up or claimed under the Constitution or treaties of the United States. Petitioners attempt to bring their case within the ambit of provision 3. However, petitioners never raised a federal right, privilege or immunity in the State courts. Nor is their newly-created claim a substantial or meritorious federal issue. Finally, a petition for writ of certiorari based on the above provisions must be filed within ninety (90) days after the entry of any judgment or decree. 28 U.S.C. § 2101. Petitioners failed to do so.

A. PETITIONERS NEVER RAISED A FEDERAL QUESTION IN THE RHODE ISLAND STATE COURTS.

It is axiomatic that this Supreme Court has no jurisdiction to exercise its appellate power under 28 U.S.C. § 1257 unless a federal question has been raised and/or decided in the State court below. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317 (1983); *Hill v. California*, 401 U.S. 797, 805, 91 S.Ct. 1106 (1971); *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969); *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434, 60 S.Ct. 670, 673, 84 L.Ed. 849 (1940).

Petitioners attempt to present to this Court the question of "[w]hether a party challenging the constitutionality of an act of the General Assembly of Rhode Island may, consistent with the constitutional protections afforded litigants, be required to prove its claim 'beyond a reasonable doubt' upon a pretrial motion to dismiss the complaint for failure to state a claim." Petition, p. i. This issue does not set forth a federal claim.

Petitioners therefore argue that the State's implementation of this standard of proof somehow denies them access to the courts, in violation of their federal due process rights. However, petitioners never presented, raised, or asserted before the State trial court an alleged federal due process right. Neither did petitioners make any such assertions on appeal to the Rhode Island Supreme Court.[1]

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[1] Indeed, petitioners have failed to set forth in their petition for certiorari, in accordance with Rule 14.1(g) of this Court's

Petitioners' arguments to the Rhode Island Supreme Court asserted merely that requiring a party to prove a statute unconstitutional beyond a reasonable doubt is "unworkable and inequitable", and "erects barriers that few if any complaints challenging legislative enactments could ever overcome. . . . " Opening Brief for Plaintiffs-Appellants, No. 96-162, Supreme Court of Rhode Island (June 17, 1996), Appendix. Such arguments do not raise or even imply an alleged violation of a federal due process right to access to the courts. Consequently, neither the Superior nor Supreme Court of Rhode Island ever addressed whether the standard requiring a plaintiff to rebut a presumption of constitutionality beyond a reasonable doubt, deprived a plaintiff of any federal right, including an alleged due process right to access to the courts.

The proffered federal issue never having been raised in or addressed by the State court, it may not now be presented. This Court therefore lacks jurisdiction to entertain petitioners' application for writ of certiorari.

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rules, "specification . . . of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way on which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on the writ of certiorari.

B. A STATE'S IMPLEMENTATION OF A STANDARD OF PROOF DOES NOT RAISE A FEDERAL DUE PROCESS CLAIM

Petitioners' recently created argument is insubstantial and without merit. The standard of which petitioners complain – that a challenger must rebut the presumption of constitutionality of a statute "beyond a reasonable doubt" is applied by courts throughout the country. *See, e.g., Watkins v. New York State Ethics Commission*, 554 N.Y.S.2d 955, 147 Misc.2d 350 (N.Y.Supp. 1990); *Felts v. State*, 537 So. 2d 995, dec. approved 549 So.2d 1373 (Fla.App. 1 Dist. 1988); *State v. Kam*, 748 P.2d 372, 69 Haw. 483 (1988); *Application of Anderson*, 114 Ill. Dec. 705, 516 N.E.2d 860, 162 Ill.App.3d 815 (Ill.App. 2 Dist 1987). *Accord, 44 Liquormart, Inc., v. Rhode Island*, 116 U.S. 1495 (1996) (applying "beyond reasonable doubt" standard to challenge to Rhode Island statute).

This standard of proof has no relationship whatsoever to any alleged right to access to the courts. As petitioners recognize in their application for writ of certiorari, due process requires only an opportunity to be heard at a meaningful time and in a meaningful manner. Pet., pages 16-17. Requiring a party to prove a particular matter "beyond a reasonable doubt" does not deprive a party of a due process right to the courts, and petitioners have cited no case law which indicates otherwise.

With reference to this specific case, petitioners answered respondents' motion to dismiss by filing an opposing brief of forty-nine (49) pages. The Superior Court held hearings on two days. After concluding that a

motion to dismiss was appropriately applied to a constitutional challenge to a statute, the Superior Court rendered a lengthy oral decision dismissing the complaint. Petitioners then filed a ninety-four (94) page Opening Brief on appeal to the Rhode Island Supreme Court, followed by a nineteen-page reply brief. The Rhode Island Supreme Court "carefully considered . . . each of the . . . arguments raised by the plaintiffs in their appeal, and [found] them to be unpersuasive." Opinion of the Rhode Island Supreme Court, Pet.App. p A-21. Petitioners obtained and enjoyed full access to both the trial and appeal courts. They were simply unable to prove their claims.

Petitioners assert that the Rhode Island courts created an irrefutable presumption that no facts exist to support a claim seeking to enforce constitutional rights. Pet., p. 20. Such assertion is plainly incorrect. In considering petitioners' constitutional challenge, the lower court simply found that the facts petitioners attempted to proffer in order to rebut the presumption of constitutionality were irrelevant to the legal claims asserted. Pet.App., p. A-21.[2]. Thus, the State followed well-established precedent by dismissing petitioners' constitutional challenges as a matter of law. *Newport Auto Salvage, Inc. v. Town Council*, 502 A.2d 339 (R.I. 1985); *Chartier Real Estate Co. v. Chafee*, 101 R.I. 544, 565, 225, A.2d 766, 777-78 (1967) (motion to dismiss was properly granted where plaintiffs

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[2] The court ruled that "there were no material facts in dispute that were outcome determinative" because the facts petitioners attempted to introduce "would not matter . . . from a legal standpoint." Pet. App. A-21.

failed to carry their burden of establishing "beyond a reasonable doubt" that, as a matter of law, certain legislation was unconstitutional).

C. THE PETITION WAS NOT TIMELY FILED

In accordance with 28 U.S.C. § 2101(c), a petition for writ of certiorari intended to bring any judgment or decree in a civil action before the Supreme Court for review "shall be taken or applied for within ninety days after the entry of such *judgment* or *decree*." (emphasis added). The Rhode Island Supreme Court issued its judgment or decree in this matter pursuant to its Order of July 19, 1996. The petition for certiorari was not filed until January 9, 1997 – far in excess of ninety days after the Rhode Island Supreme Court entered judgment against petitioners.

Petitioners appear to have calculated their ninety day period from the date of the Rhode Island court's October 11, 1996 opinion. However, this Court's rules specifically require that a petition for certiorari be filed within ninety (90) days of issuance of a "judgment or decree", not from the issuance of an opinion. 28 U.S.C. § 2101; United States Supreme Court Rule 13.

CONCLUSION

For the reasons stated above, the petition for certiorari is improper and should be denied.

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State of Rhode Island

January 24, 1997

APPENDIX

APPEDIX

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

SUPREME COURT

No. 96-162 APPEAL

WARWICK MALL TRUST, BLISS PROPERTIES, INC.,
and IRVING SCHWARTZ,

Appellants,

v.

THE STATE OF RHODE ISLAND, THE HONORABLE LINCOLN
C. ALMOND, in his capacities as Governor of the State
of Rhode Island and Chairman of the Rhode Island
Economic Development Corporation, and Providence
Place Group,

Appellees.

On appeal from the
Superior Court for Providence County,
Case No. PC 95-4960

OPENING BRIEF FOR PLAINTIFFS-APPELLANTS
WARWICK MALL TRUST,
BLISS PROPERTIES, INC., AND IRVING SCHWARTZ

* * *

QUESTIONS PRESENTED

1. Whether P.L. 95-400's provisions regarding the City of Providence's tax treaty are valid, despite that statute's lack of approval by the voters of Providence in the referendum required by R.I. Const. Article XIII, § 4?

2. Whether P.L. 95-400's provisions requiring future payments of sales tax revenues to the Providence Place Mall's developers' lenders are valid, despite P.L. 95-400's lack of approval by the voters of Rhode Island in the referendum required by R.I. Const. Article VI, § 16, in view of plaintiffs' proffered evidence that Governor Almond told the Board of the Economic Development Corporation that a failure by a future General Assembly to appropriate such funds would ruin the State's credit rating?

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4. Whether the challenged statute's predictive legislative "findings," the majority of which do not pertain to currently-existing factual circumstances, are entitled to great deference by the judiciary amounting to preclusive and conclusive effect?

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The trial court erred in failing to apply the usual Rule 12(b)(6) standard. The legal standard to be applied in passing upon a motion to dismiss is whether plaintiff would have a legal right to relief under any set of facts that fit within the compass of the complaint, and in this regard the well-pled allegations of the complaint must be accepted as true. *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Furthermore, the court must draw all reasonable inferences in favor of the non-movant. *Allen v. West Point-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991). A motion to dismiss can be granted only when it appears *beyond doubt* from an examination of the complaint that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

The trial court stood this standard on its head. The trial court erroneously imposed a "beyond a reasonable doubt" standard upon *plaintiffs*. In doing so, the Superior Court alluded to language from [*sic*] the Rhode Island Supreme Court's opinion in *Chartier Realty Company, Inc.* v. Chaffee [*sic*], 101 R.I. 544 (1967), which the Superior

Court took to suggest that the legal standard to be applied in this case was whether plaintiffs' complaint standing alone, had established the un-Constitutionality of the challenged statute "beyond a reasonable doubt." [App. Tab 4, pp. 12-18]. The "beyond a reasonable doubt" standard applies to factual matters, and usually in a criminal case. A motion to dismiss tests only the legal sufficiency of a complaint, and cannot establish contested facts. In dismissing plaintiffs' claims involving the referendum-on-debt requirement and the non-delegation doctrine, the Superior Court essentially resolved all possible factual disputes against plaintiffs and in favor of the challenged legislation.

The Superior Court's ruling erects a barrier that few if any complaints challenging legislative enactments could ever overcome, especially when plaintiff's theory is that a facially-neutral statute is discriminatory in effect or as applied.

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> The parties stipulated that the price advertising ban is vigorously enforced, that Rhode Island permits "all advertising of alcoholic beverages excepting references to price outside the licensed premises," and that petitioners' proposed ads do not concern an illegal activity and presumably would not be false or misleading. *44 Liquor Mart, Inc. v. Racine*, 829 F.Supp. 543, 545 (D.R.I. 1993). *The parties disagreed, however, about*

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> However, without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance.

Id., 1996 WL 241709, *12. This is a classic question of fact that cannot be resolved by reading the pleadings. There is an exact parallel here to appellants' claim regarding the obligation EDC will undertake to the Providence Place Mall's lenders being a State debt. However, the Superior Court disregarded plaintiffs' proffered evidence, and decided the case on an improper presumption.

If the Superior Court's application of the law is correct in this case, the United States Supreme Court's application of the law in *44 Liquormart* was error. Applying the Superior Court's reasoning to the *44 Liquormart* case results in a decision that plaintiffs there had failed at the pleading stage to demonstrate beyond a reasonable doubt that Rhode Island's price advertising ban was un-Constitutional, because their case depended on disputed facts that must be resolved in favor of the challenged enactment.

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* * *

Supreme Court, U.S.
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NO. 96-1100

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

WARWICK MALL TRUST, BLISS PROPERTIES, INC., AND IRVING SCHWARTZ,
PETITIONERS,

v.

THE STATE OF RHODE ISLAND, ET AL.,
RESPONDENTS.

On Petition for Writ of Certiorari to the Supreme Court of the State of Rhode Island

REPLY TO BRIEF IN OPPOSITION

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9 pp

QUESTION PRESENTED FOR REVIEW

Whether, in a case where the highest court of a state issues an order disposing of that case and stating that an opinion setting forth the court's reasoning will follow, the time for filing a petition for certiorari with this Court runs from the date of the order or the date the opinion is issued.

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ARGUMENT

THE PETITION IS NOT UNTIMELY BECAUSE THE CASE WAS NOT FINALLY ADJUDGED AND DECIDED UNTIL THE RHODE ISLAND SUPREME COURT ISSUED ITS OPINION.

The Respondents in this case have argued in their briefs in opposition to the petition for certiorari that this Court lacks jurisdiction to review the Rhode Island Supreme Court's decision because the petition was not timely under 28 U.S.C. § 2101(c) or Sup. Ct. R. 13.1. This argument is based upon the order of the Rhode Island Supreme Court entered July 19, 1996 which simply affirmed the judgment of the Superior Court. This order stated that "[a]n opinion setting forth the reasons for this order will follow." (A-1.) Such an opinion did ensue on October 11, 1996 (A-4), which opinion disclosed the reasoning behind the Rhode Island Supreme Court's order. That court also stated in the conclusion to the opinion that "we have affirmed the judgment of the Superior Court and denied and dismissed the plaintiffs' appeal." (A-22.) The Respondents do not claim that the petition for certiorari was not filed within 90 days of the issuance of this opinion.

The answer to this jurisdictional argument is that the July 19, 1996 order of the Rhode Island Supreme Court was not under the circumstances of this case a final judgment or decree for the purposes of 28 U.S.C. § 2101(c) and the 90-day period for applying for a writ of certiorari did not begin to run from the date of that order.

The Respondents cite no statute, rule, or case which compels the conclusion that the state court's initial order, which indicated that an opinion would follow, is a final judgment or decree for the purposes of either 28 U.S.C. § 2101 or Rule 13.1.

Indeed, this argument is refuted by this Court's rulings that the test to be applied in determining whether a lower court's order triggers the 90-day clock "is a practical one." *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-12 (1952); *Market St. Ry. v. Railroad Commission of California*, 324 U.S. 548, 552 (1945). Whether a judicial act constitutes a judgment or decree for the purposes of 28 U.S.C. § 2101(c) "ought not to be decided on nice-spun argumentation" in disregard of the practice and assumptions of the courts at issue. *Commissioner v. Bedford's Estate*, 325 U.S. 283, 287-88 (1945).

As applied to the instant case, those practical concerns include the fact that compliance with this Court's rules on the preparation of a petition for certiorari from a state court judgment or decree is essentially impossible absent the issuance of an opinion by the state court. Rule 14.1(g) of this Court requires a petition for certiorari to set forth in the statement of the case the way in which the federal claims were passed upon by all state courts, and indicates specifically that reference should be made to the court opinion. Rule 14.1(i) also requires the appendix to the petition to contain the opinions and conclusions of law of the court whose judgment is sought to be reviewed. Absent an opinion, a party seeking to file a petition for certiorari with this Court is at a loss as to how the federal claims were passed upon by the court below and is unable to adequately present those claims.

These practical concerns are even more compelling where, as in the instant case, the state court's initial order indicates that an opinion explaining its reasoning will follow. A judgment or decree of the highest court of a state is "final," and so reviewable by this Court under 28 U.S.C. § 1257(a), where it is the "final word of a final court." *Market St. Ry. v. Railroad Commission of California*, 324 U.S. at 551. The purpose behind the requirement of finality is to prevent the waste of judicial resources and promote good judicial administration. *South Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973) (citing *Radio Station WOW v. Johnson*, 326 U.S. 120, 124 (1945)). It certainly does not promote judicial economy to require a party who knows that an explanatory opinion is forthcoming to submit a petition for certiorari that cannot properly address the disposition in the court below. Not only will the party have to revise the petition once the opinion is issued, but this Court would be required to review this revised petition and will have wasted its time in reviewing the first petition.

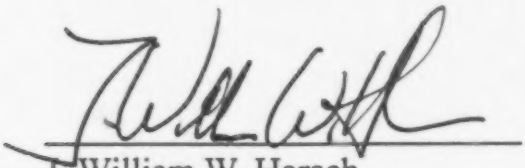
Therefore, an application of the 90-day time limit imposed by statute and Court rule that takes into account practical concerns requires that the instant petition not be deemed untimely. The situation here is not unlike cases in which this Court has held that the date a second judgment or decree is entered is deemed to be the date from which the time for petitioning for certiorari runs when the second judgment changes matters of substance "or resolves a genuine ambiguity." *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. at 211. In the instant case, the Rhode Island Supreme Court's July 19, 1996 order was certainly ambiguous because it failed to set forth the reasoning for affirming the Superior Court,

which reasoning was certainly critical to this Court's decision on whether a writ of certiorari should be issued. In light of this ambiguity and the state court's statement that an opinion would follow, the time for petitioning for certiorari must be deemed to run from the date of the issuance of that opinion. It was only on the issuance of the opinion that it can be said that the "'issues were adjudged' and settled with finality" for the purpose of triggering the 90-day time period. *Scofield v. National Labor Relations Board*, 394 U.S. 423, 427 (1969) (quoting *Market St. Ry. v. Railroad Commission of California*, 324 U.S. at 551-52).

CONCLUSION

For the reasons set forth above, the Respondents' argument that this Court lacks jurisdiction to review the judgment of the Rhode Island Supreme Court should be rejected. The Petitioners therefore request that the petition for certiorari be granted.

Respectfully submitted,



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